Supreme Court, U.S.
FILED
AUG 30 2001
OFFICE OF THE CLERK

10

No. 00-1072

IN THE

Supreme Court of the United States

LEONARD EDELMAN,

Petitioner,

v.

LYNCHBURG COLLEGE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed January 2, 2001
Certiorari Granted June 25, 2001

98 pp

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U.S. District Court
Western District of Virginia (Lynchburg)

CIVIL DOCKET FOR CASE #: 99-CV-60

LEONARD EDELMAN, Dr.
plaintiff

v.

LYNCHBURG COLLEGE
defendant

Filed: 07/08/99
Jury demand: Plaintiff
Assigned to: Judge Norman K. Moon
Referred to: Magistrate Judge Glen E. Conrad
Demand: $2,350,000
Nature of Suit: 442
Lead Docket: None
Jurisdiction: Federal Question:
Dkt # in Lynchburg Circuit : is CL99021183

Cause: 42:2000 Job Discrimination (Sex)

Proceedings include all events.

7/8/99	1	NOTICE OF REMOVAL with Attachment; FILING FEE $150.00; RECEIPT #92567 (sfc) [Entry date 07/08/99] [Edit date 07/09/99]
7/9/99	2	ORDER, Requesting Transmittal of Original Case File from Lynchburg Circuit Court (signed by Judge Norman K. Moon) [EOD Date 7/9/99] (mcp) [Entry date 07/09/99]

7/9/99	--	Magistrate's Notice (mcp) [Entry date 07/09/99]
7/14/99	3	STATE COURT RECORDS from Lynchburg Circuit Court (mcp) [Entry date 07/14/99]
7/15/99	4	MOTION WITH MEMORANDUM in Support to Dismiss by Lynchburg College (mcp) [Entry date 07/15/99]
7/16/99	5	PRETRIAL ORDER, Referring Case to Magistrate Judge Glen E. Conrad for all pretrial discovery motions and issues and whatever else as set forth in Items 1-12 of Order re: trial date, status reports, jury instructions, motions, briefs, hearings discovery, witnesses, and settlement of case (signed by Judge Norman K. Moon) [EOD Date7/16/99] (mcp) [[Entry date 07/16/99]
7/21/99	6	LETTER MOTION for approval of deadlines by Leonard Edelman (mcp) [Entry date 07/22/99]
7/27/99	7	ORDER granting [6-1] motion for approval of deadlines, plaintiff's response due 8/10/99, defendant's reply due 8/19/99, and Motion Hearing set for 1:30 8/24/99 for [4-1] motion to Dismiss [signed by Judge Norman K. Moon} [EOD Date 7/27/99] (sfc) [Entry date 07/27/99]

8/10/99	8	MEMORANDUM by Leonard Edelman in opposition to [4-1] motion to Dismiss by Lynchburg College (mcp) [Entry date 08/10/99]
8/19/99	--	Deadline updated; Motion Hearing RESET for 1:00 8/24/99 for [4-1] motion to Dismiss (NOTE: CHANGE IN TIME ONLY) (sfc) [Entry date 08/19/99]
8/19/99	9	REPLY by Lynchburg College to [8-1] Memorandum in Oppostion by Leonard Edelman to defendant's motion to dismiss (sfc) [Entry date 08/19/99]
8/24/99	--	COURT HEARING: Parties present by counsel for hearing on motion. Arguments. [4-1] motion to Dismiss under advisement. Order forthcoming (Judge Norman K. Moon OCR Aaron LaDuke) (emh) [Entry date 08/24/99]
8/30/99	10	TRANSCRIPT of Motion Hearing for date of 8/24/99 (OCR Aaron H. LaDuke) (mcp) [Entry date 08/30/99]
8/30/99	11	MOTION for Sanctions by Lynchburg College (sfc)
8/30/99	12	MEMORANDUM by Lynchburg College in support of [11-1] motion for Sanctions by Lynchburg College (sfc) [Entry date 08/30/99]

09/13/99	13	MEMORANDUM by Leonard Edelman in opposition to [11-1] motion for Sanctions by Lynchburg College (mcp) [Entry date 09/13/99]
09/20/99	14	MEMORANDUM OPINION (signed by Judge Norman K. Moon) (sfc) [Entry date 09/20/99]
09/20/99	15	ORDER granting [4-1] motion to Dismiss the Title VII Claims, and Remanding Remaining Claims to the Circuit Court for the City of Lynchburg (signed by Judge Norman K. Moon) [EOD Date 9/20/99] (sfc) [Entry date 09/20/99]
09/20/99	--	State Court Records Returned (our document #3) to Circuit Court for the City of Lynchburg (hand delivered) (sfc) [Entry date 09/20/99] [Edit date 09/20/99]
09/20/99	--	CASE CLOSED (sfc) [Entry date 09/20/99]
09/20/00	16	REPLY by Lynchburg College to response to [11-1] motion for Sanctions by Lynchburg College (sfc) [Entry date 09/21/99]
10/7/99	17	MEMORANDUM OPINION (signed by Judge Norman K. Moon) (sfc) [Entry date 10/07/99]
10/7/99	18	ORDER denying [11-1] motion for Sanctions (signed by Judge Norman K. Moon) [EOD Date 10/7/99] (sfc) [Entry date 10/07/99]

10/20/99	19	NOTICE OF APPEAL by Leonard Edelman. FILING FEE $105.00. RECEIPT #92643. Order appealed: 9/20/99 Order by Judge Norman K. Moon (sfc) [Entry date 10/20/99]
10/20/99	--	Transmittal Letter w/ Notice of Appeal and certified copy of docket to USCA re: [19-1] appeal by Leonard Edelman (sfc) [Entry date 10/20/99]
10/20/99	--	CERTIFICATE TO FOURTH CIRCUIT BY CLERK (sfc) [Entry date 10/20/99]

A TRUE COPY, TESTE:
MORGAN E. SCOTT, JR., CLERK
BY: /s/ Fay Coleman
DEPUTY CLERK

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF LYNCHBURG

DR. LEONARD EDELMAN
100 Crestview Drive
Forest, VA 24551

Plaintiff,

v. At Law: CL99021183

LYNCHBURG COLLEGE
1501 Lakeside Drive
Lynchburg, VA 24501

Serve: Alexander Bell
Registered Agent
715 Court Street
Lynchburg, VA 24505

Defendant.

FILED IN THE CLERK'S OFFICE OF THE
CIRCUIT COURT OF THE CITY OF LYNCHBURG
DATE JUN 10 1999 TIME 1:45 P.M.
TESTE: LARRY B. PALMER, CLERK
BY: /s/ Dep. Clerk

AMENDED MOTION FOR JUDGMENT

COMES NOW the Plaintiff, LEONARD EDELMAN, PH.D. ("Dr. Edelman"), by his undersigned counsel, and moves this Court for entry of judgment in his favor, and against defendant LYNCHBURG COLLEGE ("the College"), and in support of such motion alleges and avers as follows:

1. This is a civil action.

2. Plaintiff Leonard Edelman ("Dr. Edelman") alleges wrongful denial of tenure and termination in breach of his contract of employment with the College.

3. This action states federal claims against the defendant under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*.

4. This action also states claims of common law negligent retention, defamation, intention infliction of emotional distress and breach of contract.

PARTIES AND JURISDICTION

5. Dr. Edelman is a resident of Bedford County and a citizen of the Commonwealth of Virginia.

6. Lynchburg College is a Virginia corporation authorized to conduct business in the Commonwealth of Virginia, maintains a registered agent for service of process in the Commonwealth of Virginia, and regularly conducts business in the City of Lynchburg.

7. This Court has jurisdiction over Dr. Edelman' s claims under Title VII pursuant to 28 U.S.C. § 1343(a) and 42 U.S.C. § 2000e—5.

8. This Court has jurisdiction over Dr. Edelman's defamation, negligent retention, intentional infliction of emotional distress and breach of contract claims under the common law of Virginia.

9. Upon information and belief, Lynchburg College employs over 300 people and may employ over 500 people.

10. The amount in controversy in this action exceeds the jurisdictional minimum amount for this Court.

BACKGROUND

11. The College hired Dr. Edelman in August 1993 as an Assistant Professor of Biology on a tenure track. He received two years of credit on his tenure track for his prior teaching. Therefore, his probationary period was established at four years. He was eligible for tenure and promotion to Associate Professor as of September 1997.

12. Dr. Edelman and the College entered into a contractual employment relationship in August 1993. The Faculty Handbook of Lynchburg College (the "Handbook") was incorporated into this employment contract.

13. Under the terms of the employment contract, Dr. Edelman was given the expectation of receiving tenure and a promotion in 19497 if he performed his duties in a satisfactory manner. If the College decided not to grant tenure, it was to give Dr. Edelman one year's notice by way of a one year non-renewable contract extension.

14. Dr. Edelman was re-appointed for the next two academic years after receiving high commendations for all facets of his job performance, including commendations from students, faculty, staff, and administration.

15. College President Charles Warren appointed Dr. Edelman as a sexual harassment investigator in March 1995.

16. Jacqueline W. Asbury, Dean of the College, commended Dr. Edelman for his "initiative and effort in making the student research/grant workshop available to our campus colleagues" in May 1995.

17. On or about June 17, 1996, the parties entered into the last of these letter contracts ("the Contract"). The Contract specifically incorporated by reference the Handbook. The Contract is attached as Exhibit A. Applicable portions of the Handbook are attached as Exhibit B.

18. As part of the Contract, the College awarded Dr. Edelman a merit pay increase effective June 17, 1996, due to his excellence in teaching.

19. As part of the Contract, Dr. Edelman entered into the formal tenure evaluation process in the fall of 1996.

20. As part of the tenure evaluation process set forth in the Handbook, on October 14, 1996, the Chairman of the Biology Department, Dr. Orrie 0. Stenroos, strongly recommended Dr. Edelman for tenure.

21. Pursuant to the Handbook, Dr. Stenroos' s recommendation was reviewed by the Ad Hoc committee of the faculty and that committee voted unanimously to recommend tenure on November 18, 1996.

22. In late November 1996, Dean Asbury and President Warren required Dr. Edelman and other tenure candidates to meet with them to discuss their "perception and vision for the future of the college as well as [their] adaptability for the future." This meeting and discussion was not part of the tenure review process as set out in the Handbook.

23. Despite the unanimous recommendation of the Ad Hoc committee that Dr. Edelman be awarded tenure, on or about January 14, 1997, Dean Asbury notified Dr. Edelman she would not recommend him for tenure.

24. Upon receipt of Dean Asbury's memo, Dr. Edelman met with the Dean to discuss her recommendation. The Dean agreed to withhold her recommendation pending the submittal of additional materials by Dr. Edelman. During this same meeting, Dean Asbury informed Dr. Edelman that he had "something" hanging in his office that was offensive to women. Dean Asbury also made this comment about Dr. Edelman to Professor Stenroos. When Dr. Edelman asked Dean Asbury to describe the "something" that was offensive in his office, Dean Asbury was unable to recall any details about the item.

25. On January., 27, 1997, Dr. Edelman submitted a 47 page document entitled "Four Years of My Teaching Biology and My Students Learning Biology at Lynchburg College." This document detailed all facets of Dr. Edelman's teaching, his use of new teaching techniques, changes he instituted in his teaching of the introductory biology course, an analysis of intellectual development in student learning styles, summaries of undergraduate and collaborative research projects, an analysis of the student-teacher relationship, and other subjects. Dr. Edelman also submitted a four year biographic review he had used in his phytoremediation research project.

26. Dr. Darwin Jorgensen, Chairman of the Biology Department at Roanoke College, reviewed Dr. Edelman's summary and gave it high marks.

27. On February 10, 1997, Dean Asbury affirmed her decision not to recommend Dr. Edelman for tenure.

28. On February 14, 1997, Dr. Edelman wrote a letter to Dean Asbury outlining numerous factual and procedural concerns with the Dean's proposed recommendation. Receiving no response, on February 19, 1997, Dr. Edelman filed a grievance petition with the Faculty Grievance Committee.

29. The Faculty Grievance Committee conducted a thorough investigation of the tenure process as it related to Dr. Edelman. This committee interviewed Dean Asbury at length. In that interview, Dean Asbury acknowledged her disdain for the college's tenure review process. Dean Asbury acknowledged several instances where she did not abide by the procedures for tenure review set forth in the Handbook.

30. On April 2, 1997, the Faculty Grievance Committee issued a detailed report, unanimously finding that the college had violated the contractual provisions of the Handbook in its tenure review process of Dr. Edelman. A copy of this report is attached as Exhibit C.

31. In April 1997, President Warren proposed that he and Dr. Edelman agree that the department chair, the Ad Hoc committee, the personnel committee, and the Dean of the College could submit additional statements or clarifications of their positions regarding Dr. Edelman's tenure application.

32. On April 21, 1997, Dr. Edelman accepted President Warren's offer, but expressed reservations about adding this new step to the contractual review process in that it could set a precedent for future reviews. Two days later, Dr. Warren backed out of his proposal and refused to accept the additional submissions.

33. President Warren adopted Dean Asbury's recommendation not to offer tenure to Dr. Edelman. President Warren presented this recommendation to the Board of Trustees, which concurred.

34. On May 23, 1997, President Warren informed Dr. Edelman by letter that the Board of Trustees had accepted President Warren's recommendation not to award tenure to Dr. Edelman.

35. Dr. Edelman deserved to be granted tenure and to be promoted to the position of Associate Professor. Dr. Edelman taught seven different courses during a three year period. In his initial year, Dr. Edelman voluntarily undertook teaching two new courses, which he had not taught before and which were not part of his initial employment agreement, because Dr. Ralph Peters suddenly left the College. Dr. Edelman also mentored student research projects, acted as a freshman advisor, served as faculty advisor to the Biology Club, conducted career workshops for biology majors, attended seven workshops off campus for his own development and renewal, had a new course offering approved, took on overseeing the operation of the department greenhouse, and attended a number of conferences on college issues. Dr. Edelman also actively pursued research opportunities, even offering to contribute his own funds to research projects. He further developed collaborative research projects between undergraduate students and faculty.

36. Dean Asbury gave conflicting and disingenuous reasons for not recommending Dr. Edelman for tenure and violated the procedures of the Handbook in her assessment process.

37. President Warren, the Board of Trustees, and, therefore, Lynchburg College, relied on Dean Asbury's recommendation and adopted as their own Dean Asbury's reasoning behind this decision.

38. The College did not follow the procedures set forth in the Handbook for considering tenure applications and, therefore, breached its employment contract with Dr. Edelman.

Violations of the Faculty Handbook

39. The College violated the procedures of the Handbook and, therefore, of its contract with Dr. Edelman, in the following ways:

a. Requiring Dr. Edelman to submit to an interview with Dean Asbury and President Warren in November-December 1996 and relying on statements made at this meeting as part of the rationale for denying tenure to Dr. Edelman. In a memorandum dated February 10, 1997, Dean Asbury made vague reference to "materials presented for review and answers

to questions related to teaching" as part of her negative assessment. These materials and answers were never identified with any specificity, but apparently related to the earlier interview with Dr. Edelman. The Handbook did not include personal interviews with the Dean or President as part of the tenure review process.

b. Conducting informal interviews with other, unnamed people and using comments made by those people in the evaluation process.

In subsequently defending her recommendation in a letter dated February 10, 1997, Dean Asbury referred to unsolicited conversations she allegedly had with unnamed faculty members about Dr. Edelman. Neither this memorandum, the identity of these alleged persons, nor the fact—based content of these conversations were revealed. Dr. Asbury also noted she had "heard" that Dr. Edelman's first year of teaching had been a "total disaster." Dean Asbury made further reference to anonymous conversations that allegedly indicated Dr. Edelman was not a good teacher and had unduly negative opinions of the abilities of the student body. These conversations'' were not documented and the Handbook did not permit the College to rely on them in its tenure assessment of Dr. Edelman.

c. Using vague, undefined factors such as the number of Biology students and the "economic situation" of the College, without defining those factors or describing in detail how they impacted on her recommendation.

Dean Asbury never mentioned any concern about the decline in the number of biology majors or the economic situation of the college in her previous planning sessions with Dr. Stenroos, the Biology Department chairman. In fact, enrollment in biology actually increased during this time period rather than decreased. Dean Asbury later approved a request from the Biology Department to fund three additional faculty positions in the department, two of which would be tenured and one of which was Dr. Edelman's position. Dean Asbury later admitted that declining overall enrollment and declines in the number of biology majors were not factors in her decision not to recommend tenure for Dr. Edelman.

d. Falsely asserting that Dr. Edelman's teaching methods were unsound.

While Dean Asbury asserted she had "heard" that Dr. Edelman's first year of teaching had been a "disaster," Dean Asbury never observed Dr. Edelman personally teaching a class, even though Dr. Edelman invited her to do so on a number of occasions. Likewise, President Warren declined all invitations to observe Dr. Edelman's teaching methods. In fact, student evaluations of Dr. Edelman were overwhelmingly positive and his teaching methodology was praised by Dr. Jorgensen.

e. Asserting that Dr. Edelman did not engage in the necessary research for a tenure track faculty member, while simultaneously denying Dr. Edelman the opportunity to engage in research.

In fact, Dr. Edelman sought to engage in research but was repeatedly denied this opportunity by the College. The College denied Dr. Edelman's repeated requests for research supplies and even prohibited him from using his own money to buy supplies. Despite these obstacles, Dr. Edelman continued his efforts to engage in research. Interestingly, after Dr. Edelman's application for tenure was denied, he received the highest money grant for research at the college for that year.

f. Relying on the false and/or mistaken belief that Dr. Edelman had been relieved of his responsibilities for teaching freshman biology when, in fact, he had not.

g. Relying on the vague, false, and/or mistaken belief that Dr. Edelman was unnecessarily negative in his assessment of freshman biology students and using these criticisms to explain his alleged shortcomings.

In fact, Dr. Edelman made thoughtful and documented comments of the lack of motivation and other problems of his freshman students, but did not emphasize these concerns unduly.

These violations of the procedures of the Handbook for tenure decisions are set forth more fully in the Faculty Grievance Committee report, which is incorporated herein by

reference and attached as Exhibit *Religious and Ethnic Discrimination Issues*

40. Dr. Edelman is Jewish and of Polish-Jewish descent.

41. Upon information and belief, some of the vague, undocumented, and irregular conversations referred to by Dean Asbury were with a certain member of the College faculty. This faculty member had expressed professional jealousy toward Dr. Edelman on several occasions. This faculty member had also regularly made racist and anti-Semitic remarks. This faculty member's expressed opinions concerning Dr. Edelman were influenced by his anti-Semitic beliefs. Dean Asbury knew of this faculty member's anti-Semitic statements and beliefs. In relying on this faculty member's opinion and statements in making her determination, Dean Asbury, and through her Lynchburg College, discriminated against Dr. Edelman based on his ethnicity and religion (Jewish)

Gender Discrimination Issues

42. Dr. Edelman is a white male.

43. Dean Asbury has spoken on a number of occasions about her desire to increase the proportion of females on the College faculty.

44. During Dean Asbury's tenure as Dean, all recipients of tenure have been women, except for one Hispanic male. All non-renewals of contracts and denials of tenure have been to white male faculty members.

45. Dean Asbury attempted to remove at least two white male tenured professors during her tenure as Dean.

46. During the pendency of Dr. Edelman's tenure application, the College granted tenure to two female faculty members, both of whom taught in the Communications Department, which was an unprecedented action in the history of the college. Normally, only one faculty member from a given department is granted tenure in any given year.

47. After the decision not to grant Dr. Edelman tenure was finalized, Dean Asbury announced that only a female would be hired to fill Dr. Edelman's position.

48. A female was hired to fill Dr. Edelman's position.

49. At the time Dr. Edelman's tenure application was denied, he was 47 years old.

50. Dean Asbury told Lucy Nowell, a faculty member who was chairing a search committee to fill a position in the Computer Science Department, that she (Dean Asbury) would never hire or retain anyone in his or her early fifties.

51. Dean Asbury also told Ms. Nowell that men in their early fifties are "nothing but dead wood."

52. In 1998, the College also denied tenure to Dennis Roberts, a man in his early fifties with no indication of unsatisfactory performance, based on the recommendation of Dean Asbury and President Warren.

53. The College, through the actions of Dean Asbury and President Warren, has pursued a policy of age discrimination which was a factor in declining to offer tenure to Dr. Edelman.

54. Subsequent to his termination, Dr. Edelman has interviewed for several professorships and was close to securing a position. On information and belief, once the College was contacted for a reference to Dr. Edelman, Dr. Edelman was no longer considered to be a viable candidate for the positions to which he applied.

COUNT ONE

DISCRIMINATION IN THE COURSE OF EMPLOYMENT IN VIOLATION OF TITLE VII

55. The allegations of the foregoing paragraphs are incorporated as if realleged herein.

56. The College, through the actions of Dean Asbury and President Warren, engaged in a pattern and practice of discrimination against Dr. Edelman on account of his gender (male), ethnicity (Jewish), religion (Jewish), and age during the course of his employment by the College. This discrimination was with respect to Dr. Edelman's terms, conditions, and privileges of employment, and constituted a violation of Title VII of the Civil Rights Act of 1964, as amended; and other civil and criminal statutes.

57. The conduct of the College was actuated by ill will, recklessness, wilful disregard for Dr. Edelman's rights, wantonness, oppressiveness, and a spirit of mischief. The College engaged in these practices with malice and with reckless indifference to Dr. Edelman's federally protected rights, within the meaning of Section 109(b) of the Civil Rights Act of 1991.

58. As a direct and proximate result of the College's actions, Dr. Edelman has suffered and continues to suffer injury including past and future loss of income and benefits of employment, including pension and retirement benefits to which he was entitled, lost career and business opportunities and advancement, litigation expenses including attorneys' fees and costs, other past pecuniary losses, future pecuniary losses, emotional pain, suffering, inconvenience, embarrassment, humiliation, exacerbation of illnesses, mental anguish, loss of enjoyment of life, other nonpecuniary losses, and, upon information and belief, other physical injury and illness.

COUNT TWO
WRONGFUL TERMINATION OF EMPLOYMENT IN VIOLATION OF TITLE VII

59. The allegations of the foregoing paragraphs are incorporated as if realleged herein.

60. Dr. Edelman's termination from the College was due to Dr. Edelman's gender, male; his religion, Jewish; and his age, and constituted to the culmination of the College's pattern of discrimination against Dr. Edelman.

61. Two female professors from the Communications Department were tenured the year Dr. Edelman's tenure was denied. In addition, Dr. Edelman was replaced by a female.

62. Dr. Edelman's termination violated, inter alia, important public policies underlying Title VII of the federal Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., which provides that it is an unlawful discriminatory practice to discriminate against or harass an employee on the basis of sex, religion, or ethnicity or to retaliate against an employee for opposing such discrimination or harassment.

63. The conduct of the College was actuated by ill will, recklessness, wilful disregard for Dr. Edelman's rights, wantonness, oppressiveness, and a spirit of mischief. The College engaged in these practices with malice and with reckless indifference to Dr. Edelman's federally protected rights, within the meaning of Section 109(b) of the Civil Rights Act of 1991.

64. As a direct and proximate result of this termination, Dr. Edelman has suffered and continues to suffer great damages, including loss of income, loss of employee benefits, lost career and business opportunities, litigation expense including attorneys' fees, embarrassment, humiliation, inconvenience, exacerbation of illnesses, past pecuniary expenses, future pecuniary damages, mental and emotional anguish and distress, and upon information and belief, other physical injury and illness.

COUNT THREE
NEGLIGENT RETENTION

65. The allegations of the foregoing paragraphs are incorporated as if realleged herein.

66. The College owed a duty of care to its employees, including Dr. Edelman, not to retain supervisors who had discriminatory biases which may place employees at risk of suffering from that biased or discriminatory conduct.

67. The College owed a duty of care to its employees, including Dr. Edelman, to collect, analyze, and consider in a reasonable manner background information on its supervisory employees, during the ongoing process of retaining those employees, to insure that such supervisory employees did not have unfair or discriminatory biases that would pose a threat of a hostile work environment to the College's employees.

68. The College breached this duty of care by failing to collect, analyze, or consider appropriate background material regarding Dean Asbury, while retaining Dean Asbury as a supervisory employee, and in refusing to act upon knowledge it possessed of Dean Asbury's discriminatory biases.

69. Due to its breach of these duties, the College retained Dean Asbury as a supervisory employee. Had the College performed these duties reasonably, it would not have retained Dean Asbury, particularly in a supervisory position.

70. The College's breach was a proximate cause of the incidents of discrimination, as well as a proximate cause of Dr. Edelman's wrongful discharge and breach of contract perpetrated by Dean Asbury and the College on Dr. Edelman, because this breach permitted Dean Asbury to use her supervisory authority to accomplish each act of discrimination and, ultimately, Dr. Edelman's wrongful termination.

71. As a direct and proximate result of this negligent retention, Dr. Edelman suffered and continues to suffer injury, including medical expenses, other pecuniary losses, future pecuniary losses, emotional pain, suffering, embarrassment, humiliation, inconvenience, exacerbation of illnesses, mental anguish, loss of enjoyment of life, other nonpecuniary losses, and upon information and belief, other physical injury and illness.

COUNT FOUR

BREACH OF CONTRACT

72. The allegations of the foregoing paragraphs are incorporated as if realleged herein.

73. The College failed to follow the procedures set forth in the Handbook in evaluating Dr. Edelman's application for tenure, as set forth more specifically above. The Handbook was part of the employment contract between Dr. Edelman and Lynchburg College. The College therefore committed breaches of its contract with Dr. Edelman.

74. As a direct and proximate result of this breach of contract, Dr. Edelman has suffered and continues to suffer injury including past and future loss of income, lost benefits of employment, other past pecuniary loses, future pecuniary losses, inconvenience, other nonpecuniary losses, and other injury as set forth above.

COUNT FIVE

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

75. The allegations of the foregoing paragraphs are incorporated as if realleged herein.

76. The College's harassing, discriminatory, and retaliatory conduct was intentional or reckless in that the College had the specific purpose of inflicting emotional distress on Dr. Edelman, fully intended its conduct, and knew or should have known that severe emotional distress would likely result.

77. The College's conduct was outrageous and intolerable in that it offends against generally accepted standards of decency and morality.

78. The College's actions constitute a single, continuing course of conduct from January 14, 1997, through the present.

79. The College's conduct was actuated by malice, spite, and ill will; was wilful and wanton; and evinced conscious disregard for the rights of Dr. Edelman.

80. As a proximate result of the College's conduct, Dr. Edelman has suffered and continues to suffer severe emotional distress.

81. As a direct and proximate result of the College's conduct, Dr. Edelman has suffered and will in the future suffer great damages, including loss of income, loss of employee benefits, lost career and business opportunities and advancement, litigation expenses including attorneys' fees, embarrassment, humiliation, inconvenience, exacerbation of existing illnesses, severe mental anguish, stress, pain, suffering, medical expense, physical impact, and other physical injury and illness.

COUNT SIX

DEFAMATION

82. The allegations of the foregoing paragraphs are incorporated as if realleged herein.

83. The remarks made by the College to Dr. Edelman's prospective employers were false, made with malice, and intended to cause harm to Dr. Edelman.

84. As a direct and proximate result of the College's defamatory remarks regarding Dr. Edelman, Dr. Edelman has suffered and will in the future suffer great damages, including loss of income, loss of employee benefits, lost career and business opportunities and advancement, past pecuniary expenses, future pecuniary expenses, litigation expenses including attorneys' fees, embarrassment, humiliation, inconvenience, exacerbation of existing illnesses, severe mental anguish, stress, pain, and suffering, and, upon information and belief, other physical injury and illness.

PRAYER FOR RELIEF

WHEREFORE, SAID PREMISES BEING CONSIDERED, PLAINTIFF, DR. LEONARD EDELMAN, respectfully requests that judgment be entered in his favor, and against the defendant, and that this Court further:

(a) Order Lynchburg College to reinstate Dr. Edelman as a member of its faculty and grant him tenure retroactive to September 1, 1997.

(b) Award Dr. Edelman lost wages at the level of Associate Professor of Biology from September 1,1997 through the date of trial.

(c) Award Dr. Edelman compensatory damages in the amount of Two Million Dollars ($2,000,000);

(d) Award Dr. Edelman punitive damages in the amount of Three Hundred Fifty Thousand Dollars ($350,000);

(e) Award Dr. Edelman costs of suit, fees, and such other and further relief as may be appropriate under the circumstances;

(f) Award prejudgment and post-judgment interest on all compensatory damages awarded;

(g) Order Lynchburg College to abide by the procedures set forth in its Faculty Handbook in assessing the tenure applications submitted by its faculty; and

(h) Order Lynchburg College to undergo an assessment, approved by the Dr. Edelman and the Virginia Human Rights Council, of the College's anti—discrimination policy as it pertains to its employment relationship with its faculty.

JURY DEMAND

PLAINTIFF DEMANDS TRIAL BY JURY.

June 10, 1999

Respectfully submitted,

DR. LEONARD EDELMAN

By /s/ Kristine H. Smith
Counsel for Plaintiff

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Dr. Leonard Edelman

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CIVIL ACTION NO. 6:99CV0060

DR. LEONARD EDELMAN, Plaintiff,

v.

LYNCHBURG COLLEGE, Defendant.

September 20, 1999

ORDER

JUDGE NORMAN K. MOON

Dr. Leonard Edelman filed this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that he was wrongfully denied tenure and terminated as the result of discrimination on the account of his gender, ethnicity, religion, and age. Dr. Edelman also asserts Virginia state law claims of negligent retention, breach of contract, intentional infliction of emotional distress, and defamation. The action was originally filed in the Circuit Court for the City of Lynchburg, Virginia. Defendant Lynchburg College, having removed the action to this Court, filed a motion to dismiss the Title VII claims for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Defendant's motion to dismiss also seeks to dismiss the negligent retention, intentional infliction of emotional distress, and defamation claims for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons set forth in the attached Memorandum Opinion, Defendant's motion to dismiss the Title VII claims is GRANTED. Because this Court lacks jurisdiction over the remaining claims, they are REMANDED to the Circuit Court for the City of Lynchburg.

The Clerk of the Court is directed to send a copy of this Order and the attached Memorandum Opinion to all parties and counsel of record.

ENTERED: [Norman K. Moon]
United States District Judge

9-20-99
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CIVIL ACTION NO. 6:99CV0060

DR. LEONARD EDELMAN, Plaintiff,

v.

LYNCHBURG COLLEGE, Defendant.

September 20, 1999

MEMORANDUM OPINION

JUDGE NORMAN K. MOON

Dr. Leonard Edelman filed this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that he was wrongfully denied tenure and terminated as the result of discrimination on the account of his gender, ethnicity, religion, and age. Dr. Edelman also asserts Virginia state law claims of negligent retention, breach of contract, intentional infliction of emotional distress, and defamation. The action was originally filed in the Circuit Court for the City of Lynchburg, Virginia. Lynchburg College removed the action to this Court and filed a motion to dismiss the Title VII claims for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Defendant's motion to dismiss also seeks to dismiss the negligent retention, intentional infliction of emotional distress, and defamation claims for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). Because Dr. Edelman failed to timely file his claim with the Equal Employment Opportunity Commission, Lynchburg College's motion to dismiss the Title VII claims is GRANTED. The remaining state law claims are REMANDED to the Circuit Court for the City of Lynchburg, Virginia.

I. BACKGROUND

Dr. Leonard Edelman, a Jewish white male, was hired by Lynchburg College (hereinafter "the College") as an Assistant Professor in 1993. Dr. Edelman entered into Lynchburg College's formal tenure evaluation process in the fall of 1996. He received tenure recommendations from the Chairman of the Biology Department and an ad hoc committee of the faculty. However, Dean Jacqueline W. Asbury recommended to President Charles Warren that tenure be denied. On May 23, 1997, President Warren informed Dr. Edelman by letter that the College's Board of Trustees had accepted his subsequent recommendation not to award Dr. Edelman tenure.

On November 14, 1997, Dr. Edelman sent a letter to the Equal Employment Opportunity Commission (hereinafter "EEOC") "request[ing] to file a charge of employment discrimination against Lynchburg College in regards to their personnel decisions concerning [him] during January-June, 1997 culminating in the denial of [his] continued employment at the college." In this letter, which was not made under oath or affirmation, Dr. Edelman stated his belief that this case was "one of gender-based employment discrimination, exacerbated by discrimination on the basis of [his] family's national origin and religion." The November 14 letter was followed by a letter from Dr. Edelman's counsel on November 26, 1997, which stated that "Professor Edelman would like to have a personal interview with an EEOC investigator prior to the final charging documents being served on the college." Counsel concluded the November 26 letter by stating that it was his "understanding that delay occasioned by the interview will not compromise the filing date, which will remain as November 14, 1997." On December 3, 1997, Rosalind Hall-Smith, the EEOC Supervisor of the Charge Receipt/Technical Informational Unit, responded to the November letters by statuting that more information was needed before the matter could be pursued any further. Hall-Smith's letter concluded by stating that the EEOC would assume that Dr. Edelman did not intend to file a charge of discrimination with them if the EEOC did not hear from him within 30 days of the December 3 letter.

The EEOC conducted an interview with Dr. Edelman on March 3, 1998. On March 18, 1998, the EEOC sent Dr.

Edelman a Charge of Discrimination form which it had prepared after the March 3 interview. Dr. Edelman signed the Charge of Discrimination form and declared, under the penalty of perjury, that he believed that he was "denied tenure and terminated because of [his] sex (male) in violation of Title VII of the Civil Rights Act of 1964, as amended." Dr. Edelman did not check the box on the Charge of Discrimination form beside the statement: "I want this charge filed with both the EEOC and the state or local Agency, if any." The Charge of Discrimination form stated that the earliest and latest date of discrimination was June 6, 1997. Upon the filing of the Charge of Discrimination on April 15, 1998, the EEOC designated Dr. Edelman's claims as Charge Number 122980526.

II. DISCUSSION

A *Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction*

A plaintiff has the burden of proving the existence of subject matter jurisdiction. *Evans v. B.F. Perkins Co.*, 166 F.3d 642 (4th Cir. 1999). Lynchburg College now seeks a dismissal for lack of subject matter jurisdiction due to Dr. Edelman's alleged failure to timely pursue EEOC proceedings and state enforcement proceedings under state law with the Virginia Council on Human Rights (hereinafter "VCHR"), which is charged with administering the provisions of the Virginia Human Rights Act (hereinafter "VHRA"). Va. Code § 2.1-714 *et seq.* The pertinent provision of Title VII states:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice . . . **no charge may be filed** . . . by the person aggrieved **before the expiration of sixty days after proceedings have been commenced under the State or local law,** unless such proceedings have been earlier terminated. . . If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and

> signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

41 U.S.C. § 2000e-5(c)(emphasis added). Thus, a plaintiff is required to exhaust administrative and state remedies prior to filing an action in federal court. Typically, a plaintiff litigating a claim under Title VII has 180 days from the time of the aggrieved action in which to file a complaint with the EEOC. 42 U.S.C. § 2000e-5(e). Once the EEOC issues a right-to-sue letter, the plaintiff may then file suit in federal court. If, however, the plaintiff resides in a "deferral state" within the meaning of 42 U.S.C. § 2000e-5(c), the plaintiff will have 300 days in which to commence proceedings under the appropriate state or local law. *See Davis v. North Carolina Dep't of Correction*, 48 F. 3d 134, 137-40 (4th Cir. 1995)(stating that § 2000e-5 requires plaintiff to commence proceedings under state law before the EEOC can act upon federal discrimination claims). A "deferral state" is one which has a state or local law "prohibiting the unlawful employment practice alleged" and a state agency authorized "to grant or seek relief" from the practice. *Id.*; *EEOC v. Hansa Products, Inc.*, 44 F. 2d 191, 192 n. 1 (4th Cir 1988).

Virginia is such a "deferral state" and the VCHR is a "deferral" agency within the meaning of the statute with primary responsibility for enforcement of Title VII. *Capps v. City of Lynchburg*, Civil Action No. 6:99CV0048 (W.D.Va., Lynchburg Div., 08/12/99); *Tinsley v. First Union National Bank*, 155 F. 3d 435 (4th Cir. 1998). Thus, for this Court to have subject matter jurisdiction over Dr. Edelman's complaint, he must have filed a discrimination claim with the EEOC and the VCHR. The EEOC Charge of Discrimination, which was sworn and signed by Dr. Edelman, stated that the last date on which he was discriminated against was June 6, 1997. Thus, the last date for filing, by Dr. Edelman's own calculations beginning with June 6, 1997 as the latest date of discrimination, would be April 2, 1998. Because this Charge of Discrimination was not filed with any agency until April 15, 1998, Dr.

Edelman failed to file within the 300 days allowed in which to commence proceedings.

Dr. Edelman argues that he did timely file his complaint because the November 1997 letters were written and sent within the 300 day time limit. He further argues that the April 15, 1998 Charge of Discrimination relates back to the November 14, 1997 letter and that his filing date should, therefore, be considered as November 14, 1997. While the Code of Federal Regulations provides that "[a] charge may be amended to cure technical defects or omissions . . . ", the problem with the plaintiff's argument is that the November 14, 1997 letter did not constitute a charge to which the April 15, 1998 charge could relate.

Title VII requires charges to be made "under oath or affirmation." 42 U.S.C. § 2000e-5(b). Dr. Edelman's November 14, 1997 letter was not made under oath or affirmation. Title VII requires charges to contain "such information and be in such form as the Commission requires." *Id.* The EEOC responded to the November letters from Dr. Edelman and his attorney by stating that the information provided was not sufficient for the EEOC to continue investigating Dr. Edelman's claim. Title VII states that "[w]henever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . on such employer . . . within ten days." *Id.* The EEOC did not serve notice of any discrimination charge on Lynchburg College within ten days of the November letters. In fact, Dr. Edelman's counsel specifically stated in his November 26, 1997 letter that Dr. Edelman wanted an interview with an EEOC investigator before any final charging documents were forwarded to Lynchburg College. The Court further observes that no charge number was assigned to the November 14, 1997 letter, that it was not sent as a charge of discrimination to the VCHR, and that the April 15, 1998 Charge of Discrimination does not even reference it. Thus, the Court agrees with the defendant's assertion that neither Dr. Edelman nor the EEOC proceeded as if the November 1997 letter did, or were intended to,

commence proceedings.[1] Accordingly, the November 14, 1997 letter did not commence proceeding. As a result, there is no charge for the April 15, 1998 charge to relate back. Thus, the filing date is April 15, 1998, which is beyond the 300 days allowed to timely commence proceedings.

Dr. Edelman claims that even if he did not timely commence proceedings, he is entitled to equitable tolling of the filing period. In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed. 2d 234 (1982), the United States Supreme Court held that "filing a charge of discrimination with the EEOC is . . . a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." Dr. Edelman, however, fails to establish that there are any reasonable grounds in this situation to warrant an equitable tolling of the filing requirements.

Although Dr. Edelman argues that he is entitled to equitable tolling because of the EEOC's delay in responding to his letter, the EEOC interviewed him and then mailed the prepared Charge of Discrimination form to him on March 18, 1998, within the time allowed to commence preceding. The letter attached to the prepared Charge of Discrimination form invited Dr. Edelman to make any necessary corrections. All that Dr. Edelman had to do at that point was to review the form, sign it, check the box that would have simultaneously filed the charge with the VCHR, and mail the charge back to the EEOC in the enclosed postage paid envelope. Because Dr. Edelman has not shown that there was an unreasonable delay on the part of the EEOC from the time that he initially contacted them six months after the last date of discrimination to the time that he received the Charge of Discrimination in the mail, this Court does not conclude that the period of time that lapsed before receiving the prepared Charge of Discrimination warrants an equitable tolling of the time requirements.

---

[1] This Court does observe that Dr. Edelman's counsel stated in his November 26, 1997 letter that he assumed that the filing date would be considered as of November 14, 1997. This Court, however, is aware of no authority that would allow a declaration of a party (or a party's counsel) of what should be considered a fling date to circumvent the requirements of Title VII. A filing date is established when proceedings are commenced as contemplated by the provisions of Title VII.

Similarly, the Court also disagrees with Dr,[sic] Edelman's argument that equitable tolling should be granted because Lynchburg College was not unduly prejudiced by his failure to commence proceedings in a timely manner. This argument fails to observe the fact that "[a]lthough absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified, it is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152, 104 S.Ct. 1723, 1726 (1984). Dr. Edelman's situation is not one where the delays of anyone besides himself hindered his ability to timely commence proceedings. The EEOC did not lead him to believe that he had done everything required to commence proceedings. Following the November 1997 letters, the EEOC advised Dr. Edelman that the November 1997 letters were not sufficient and that additional information was needed before the matter could be pursued. Similarly, Dr. Edelman's situation is not one where Lynchburg College engaged in any type of misconduct that would have lulled him into inaction. Thus, there is no independent factor that would warrant equitable tolling. This Court may not grant equitable tolling just because there has not been a showing that Lynchburg College would be prejudiced by extending the time in which Dr. Edelman could have commenced proceedings. As stated by the United States Supreme Court:

> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. . . . [I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

Id.

The defendant's motion to dismiss the Title VII claim for lack of subject matter jurisdiction is GRANTED.

B. *Defendant's Motion to Dismiss Other Pending Motions*

Finally, in response to the defendant's 12(b)(6) motion to dismiss the state law claims for failure to state a claim upon which relief can be granted, these claims are REMANDED to the Circuit Court for the City of Lynchburg.

The Clerk of the Court is directed to send a copy of this Order to all parties and counsel of record.

ENTERED: /s/ Norman K. Moon
U.S. District Judge

9-20-99
Date

United States Court of Appeals,
Fourth Circuit.

Leonard EDELMAN,
Plaintiff-Appellant,

v.

LYNCHBURG COLLEGE,
Defendant-Appellee.

No. 99-2408

Argued: June 8, 2000
Decided: Oct. 2, 2000

Affirmed and remanded.

Luttig, Circuit Judge, filed concurring opinion.

Before WILKINS and LUTTIG, Circuit Judges, and BEEZER, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

BEEZER, Senior Circuit Judge:

Leonard Edelman appeals the district court's dismissal of his employment discrimination action for lack of subject matter jurisdiction. This case presents an issue of first impression in this circuit: whether 29 C.F.R. § 1601.12(b), a regulation promulgated by the Equal Employment Opportunity Commission ("EEOC"), conflicts with the statutory requirements of Title VII of the Civil Rights Act, specifically 42 U.S.C. § 2000e-5(b) and 2000e-5(e)(1), to the extent that the regulation permits a charge of discrimination to be verified after the expiration of the applicable limitations period. We have jurisdiction pursuant to 28 U.S.C. § 1291. Because we conclude that, so applied, the EEOC regulation is contrary to the plain language of the statute, we affirm the dismissal of

Edelman's action on the grounds that he failed to file a timely charge of discrimination.

I

Edelman, a white Polish-Jewish male biology professor, was denied tenure by Lynchburg College on June 6, 1997. On November 14, 1997, Edelman sent a letter to the EEOC alleging that he had been subject to "gender-based employment discrimination, exacerbated by discrimination on the basis of [his] family's national origin and religion." According to Edelman, Jacqueline Asbury, the Dean of the College, opposed his tenure because she wanted to improve the percentage of tenured women on the faculty. Edelman claims that Asbury ignored the uniform support of his department chairman, an ad hoc faculty committee, and the Faculty Personnel Committee. At the conclusion of his letter, Edelman wrote, "I hereby file a charge of employment discrimination against Lynchburg College (Dean Jacqueline Asbury, President Charles Warren and the Board of Trustees) and I call upon the EEOC to investigate this case [.]" Edelman's letter was received by the EEOC on November 18, 1997.

On November 26, 1997, Edelman's attorney sent another letter to the EEOC that stated:

> Professor Edelman would like to have a personal interview with an EEOC investigator prior to the final charging documents being served on the college. It is my understanding that delay occasioned by the interview will not compromise the filing date, which will remain as November 14, 1997. Please advise if my understanding in this regard is not correct.
>
> * * *
>
> Finally, please have the investigator contact this office to schedule the interview at a mutually convenient time.

Shortly thereafter, the EEOC sent a letter to Edelman advising him that it needed additional information in order to investigate his case. The EEOC's letter urged Edelman to set up an interview "as soon as possible because a charge of

discrimination must be filed within the time limits imposed by law[.]"

On February 17, 1998, the EEOC sent Edelman an appointment notice advising him that his interview was scheduled for March 3, 1998. The interview was conducted as scheduled. On March 18, 1998, the EEOC mailed a draft charge to Edelman for his signature. Edelman's verified charge of discrimination was filed with the EEOC on April 15, 1998--313 days after the date of alleged discrimination.

The EEOC did not assign a number to Edelman's case until after it received his verified charge. Approximately one week later, the EEOC forwarded the charge to both Lynchburg College and the Virginia Council of Human Rights ("VCHR"), the state agency authorized to seek relief from unlawful employment practices. After completing its investigation, the EEOC issued Edelman a right-to-sue letter on March 26, 1999.

Edelman initially filed this action in state court, alleging state law claims of wrongful termination, breach of contract, and intentional infliction of emotional distress. Lynchburg College removed the action to federal court after Edelman amended his complaint to assert a cause of action under Title VII, 42 U.S.C. §§ 2000e through 2000e-17. Lynchburg College then moved for dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Because the district court concluded that Edelman failed to timely file his charge of discrimination, it granted Lynchburg College's motion, dismissed the Title VII claim, and remanded Edelman's remaining claims to state court. Edelman timely appeals.

II

We review de novo a district court's dismissal for lack of subject matter jurisdiction under Rule 12(b)(1). *See Evans v. B.F. Perkins Co*, 166 F.3d 642, 647 (4th Cir.1999).

In order to assert a Title VII claim in federal court, a plaintiff must first exhaust his administrative remedies by filing a charge of discrimination with the EEOC. *See Taylor v. Virginia Union Univ.*, 193 F.3d 219, 239 (4th Cir.1999). Title VII establishes two potential limitations periods within which the discrimination charge must be filed with the EEOC. *See* 42

U.S.C. § 2000e-5(e)(1); *see also Tinsley v. First Union National Bank*, 155 F.3d 435, 439 (4th Cir.1998). The basic limitations period is 180 days after the alleged unlawful employment practice. *See* 42 U.S.C. § 2000e-5(e)(1). The limitations period is extended to 300 days, however, in "deferral states." *See id.* § 2000e-5(e)(1).

A "deferral state" is one which has a state law "prohibiting the unlawful employment practice alleged" and a state or local agency authorized "to grant or seek relief" from the practice. *See id.* 2000e-5(c). Virginia is a "deferral state." *See Tinsely*, 155 F.3d at 440. Accordingly, the 300-day limitations period applies to Edelman's Title VII claim.

III

Edelman argues that the district court erred in dismissing his Title VII claim because his April 15, 1998 charge of discrimination related back to his November 14, 1997 letter and was thus timely filed within 300 days of June 6, 1997, the date of the alleged discrimination. Title VII states that charges of discrimination "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). The relevant EEOC regulation states that "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b).

Edelman's letter was mailed to the EEOC within 300 days and sufficiently identified the parties and the alleged discriminatory action. However, the letter was not sworn to under oath or affirmation. Nevertheless, Edelman relies on the second sentence of the regulation, which provides that "[a] charge may be amended to cure technical defects or omissions, including the failure to verify the charge, or to clarify or amplify allegations made therein. Such amendments ... will relate back to the date the charge was first received." *Id.*

The parties agree that if the regulation is applied to Edelman's discrimination charge, the sworn-but-untimely charge relates back to his unsworn-but-timely letter and is thus timely filed. The parties disagree, however, as to whether the regulation may be so applied.

In order to answer this question, we must carefully consider the relationship between the regulation (Section 1601.12(b)) and the statute (Title VII, specifically 42 U.S.C. § 2000e-5(b) and 2000e-5(e)(1)). We begin with the framework established by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.* at 842-43.

In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), the Court considered the Chevron framework in the specific context of Title VII. The Court made clear the standard by which we are guided:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent."

Id. at 340 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989)).

Step one of the *Chevron* analysis, as confirmed by *Robinson*, requires us to determine whether Congress has expressed its intent with respect to the issue at hand. In undertaking this analysis, we are mindful that "agency power is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4th Cir.1998) (quoting *Ernst &*

Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976)) (internal quotation marks and other citations omitted).

The precise question at issue in this case is whether verification must occur within the statutory limitations period. "[T]he first place where we must look to see if Congress has spoken to the issue with which we are concerned and whether Congressional intent in that regard is clear is on the face of the statute." *Kofa v. INS*, 60 F.3d 1084, 1088 (4th Cir.1995). As we have earlier stated, "[s]tatutory construction must begin with the language of the statute." *Id.*

We conclude that Congress has unambiguously spoken on this issue. As noted above, the language of the statute itself requires that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). The plain meaning of this language compels the conclusion that if a discrimination claim is not in writing, under oath or affirmation, containing the information and in the form required by the Commission, it is not a charge.

In defining a charge, Congress chose to limit the EEOC's authority. While Congress expressly delegated to the EEOC the power to delineate the form and content of the charge, it did not give the EEOC authority to tamper with the oath or writing requirements. Nor did Congress give the EEOC authority to alter the limitations period. On the contrary, the statute affirmatively and plainly establishes the time period within which a charge must be filed. *See id.* § 2000e-5(e)(1).

Because a charge requires verification, *see id.* § 2000e-5(b), and because a charge must be filed within the limitations period, *see id.* § 2000e-5(e)(1), it follows that a charge must be verified within the limitations period. Thus, to the extent that the regulation permits a charge to be verified after the expiration of the limitations period, it thwarts the plain language of Title VII.

Having concluded that application of the EEOC's regulation in this case contravenes Congress's intent, as expressed through the plain language of the statute, we need not proceed further. Step two of the *Chevron* analysis does not come into play, and we do not apply the EEOC regulation. *See*

Chevron, 467 U.S. at 843 n. 9, 104 S.Ct. 2778 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *see also Brown & Williamson*, 153 F.3d at 161 ("It is only if the intent of Congress is ambiguous that we defer to a permissible interpretation by the agency.").

The Supreme Court has long adhered to the rule that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n. 9. *See, e.g., FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) ("[Courts] must reject administrative constructions of the statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."); *NLRB v. Brown*, 380 U.S. 278, 291 (1965) ("Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions."); *Webster v. Luther*, 163 U.S. 331, 342 (1896) ("But this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute").

Likewise, this circuit has refused to defer to agency interpretations that are contrary to the statute at issue. *See, e.g., In re Apex Express Corp.*, 190 F.3d 624, 641 (4th Cir.1999) ("Here, there is no ambiguity in the text of the statute to justify the [agency's] position or a turn to legislative history."); *Cabell Huntington Hosp. v. Shalala*, 101 F.3d 984, 988 (4th Cir.1996) ("We cannot endorse the Secretary's reading. To do so, we would have to violate both a clear canon of statutory construction, and the plain meaning of the two terms.").

In keeping with the tradition that requires us to protect the will of Congress, we hold that the regulation, 29 C.F.R. § 1601.12(b), may not be applied to allow Edelman's untimely charge to relate back to his November 14, 1997 letter.

IV

Edelman argues that our decision today conflicts with our earlier discussions of the regulation in *Tinsely v. First Union National Bank*, 155 F.3d 435 (4th Cir.1998), and *Balazs v. Liebenthal*, 32 F.3d 151 (4th Cir.1994). We disagree.

In *Balazs*, the earlier of the two cases, we addressed the regulation in the context of a plaintiff's attempt to verify his allegations of discrimination almost four months after the EEOC issued plaintiff a right-to-sue letter and terminated its processing of his case. *See Balazs*, 32 F.3d at 157. The plaintiff made two arguments on appeal: first, that a charge of discrimination did not require verification; and, second, that an unverified charge may be cured by amendment. *See id.* at 156. We rejected outright the plaintiff's first argument, concluding, as we conclude today, that "a sworn charge of discrimination with the EEOC is a mandatory prerequisite to the validity of the charge." *Id.*.

With respect to the plaintiff's second argument in *Balazs*, although we noted that "[i]t has been held that this regulation is valid and is not contrary to the statute requiring verification of charges," *id.* at 157 (citing *Peterson v. City of Wichita*, 888 F.2d 1307, 1308-09 (10th Cir.1989)), we refused to apply the regulation under the facts of the case, *see id.* We expressed our concern that "[c]arried to its logical conclusion, under the EEOC's interpretation of its regulation it would never be too late to verify a charge[.]" *Id.* Thus, we determined that "a reasonable construction" of the regulation would "simply allow charges to be verified and to relate back only so long as the charge is a viable one in the EEOC's files [.]" *Id.* Here, we similarly conclude that a reasonable construction must be imposed on the regulation, one which does not allow relation-back of the verification requirement beyond the time limitation prescribed by Congress.

We briefly mentioned both the regulation and *Balazs* in a footnote in *Tinsley*:

> The district court also rejected Tinsley's claim that her untimely formal charge amended and related back to her timely-but-unsworn letter. In so ruling, the district court inexplicably ignored the applicable EEOC

> regulation, 29 C.F.R. § 1601.12(b), which explicitly allows such an amendment. What is more, the district court ignored the recent conclusion of this Circuit approving the very use of the regulation that Tinsley, joined by the EEOC, urges: allowing her verified claim to amend and relate back to the date her unverified claim was filed.

Tinsley, 155 F.3d at 439 n. 2 (citing *Balazs*). We noted, however, that in light of our conclusion that Tinsley's verified charge was filed within the applicable limitations period, which we held to be 300 days rather than 180, there was no need to address the regulation. *See id.* ("Because we hold that the appropriate statute of limitations period was 300 days, we need not resolve any of these other questions."). Thus, the most that can be said about our discussion of the regulation in Tinsley is that it is dictum. Moreover, contrary to Edelman's characterization, the facts of this case are materially different from those of Tinsley. Tinsley verified his allegations of discrimination within the statutory time period, whereas Edelman did not.

V

Although our decision today is consistent with our prior discussions of the regulation, we are mindful that our analysis conflicts with that of several other circuits.

In *Philbin v. General Electric Capital Auto Lease, Inc.*, 929 F.2d 321 (7th Cir.1991), the Seventh Circuit reversed a decision of the district court dismissing the plaintiff's Title VII action as untimely. *See id. at* 322. The *Philbin* court held that a timely filed Intake Questionnaire, which is verified after the

limitations period, may be sufficient to constitute a charge.* *See id. at* 323.

The court relied on two factors in reaching its decision. First, the court stated that "Title VII is remedial legislation which must be construed liberally." *Id.* Citing its previous decision in *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir.1968), in which it stated that the verification requirement was "directory and technical rather than mandatory and substantive," *Choate*, 402 F.2d at 359, the *Philbin* court concluded that "[i]n keeping with the broad purposes of the act, the omission of technical requirements which are later fulfilled should not affect the timeliness or validity of the charge." *Philbin*, 929 F.2d at 324.

In contrast to the Seventh Circuit, we have previously held that the oath requirement contained in Title VII "is cast in mandatory terms." *Equal Employment Opportunity Comm'n v. Appalachian Power Co.*, 568 F.2d 354, 355 (4th Cir.1978). We also noted then, as we confirm now, that we "see no reason to ignore the plain language that Congress has enacted." *Id.*; *accord Hamel v. Prudential Ins. Co.*, 640 F.Supp. 103, 105 (D.Mass.1986) ("Although an Intake Questionnaire is signed, it is not signed under oath. Any suggestion that this distinction is formalistic tends to ignore the significance of a perjury conviction.").

The second factor relied upon by the *Philbin* court was "the deference accorded EEOC regulations." *Philbin*, 929 F.2d at 324. In applying the *Chevron* analysis, the court failed to give sufficient weight to the plain language of the statute, focusing instead on whether the EEOC's regulation represented a reasonable interpretation of the statute. The court did note,

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* The court did not go so far as to say that a subsequently-verified Intake Questionnaire will always constitute a charge. *See Philbin*, 929 F.2d at 324. Instead, the court considered the EEOC's treatment of the questionnaire. Specifically, the court recognized that the EEOC had not only assigned a charge number to the questionnaire within the 300-day time period, but also notified Philbin's employer within the same period. *See id.* In Edelman's case, the EEOC neither assigned a charge number nor notified Lynchburg College of Edelman's claim within the 300-day limitations period.

however, that "[w]hile the statute does require that a complainant verify a charge, the statute does not require that the verification take place prior to the expiration of the 300-day time period." *Id.*

As discussed in Section III above, we read the plain language of the statute differently. Moreover, while we recognize the remedial nature of Title VII, we see no reason to distort Congress's mandate that charges be timely verified in order to make room for the EEOC's regulation. Cf. *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 150 (1984) (holding that there is "no satisfactory basis for giving Title VII actions a special status under the [Federal] Rules of Civil Procedure").

Finally, we note that the Seventh Circuit is not the only other circuit to have addressed the conflict between the EEOC regulation and the statutory provisions of Title VII. Other circuits have approved the application of the regulation to permit the relation-back of charges that were verified after the limitations period. *See Peterson v. City of Wichita*, 888 F.2d 1307, 1308 (10th Cir.1989) (rejecting the district court's conclusion that regulation was contrary to statute and thus beyond EEOC's power to promulgate); *Casavantes v. California State Univ.*, 732 F.2d 1441, 1442-43 (9th Cir.1984) (noting that its position is "consistent with the recent trend in Title VII jurisprudence which recognizes the importance of nontechnical interpretations of the procedural requirements inherent in the processing of discrimination claims"; condemning contrary position as "overly formalistic"); *Price v. Southwestern Bell Tel. Co.*, 687 F.2d 74 (5th Cir.1982) (reversing summary judgment in favor of employer because factual issues remained as to whether form completed by plaintiff constituted "charge" and as to whether EEOC waived verification requirement). But *see Lawrence v. Cooper Communities, Inc.*, 132 F.3d 447 (8th Cir.1998) (holding that Intake Questionnaire does not constitute a "charge" because it is not verified and that regulation only allows an amendment to relate back to the date a charge is first received).

We disagree with these decisions, in short, because we believe that they improperly substitute policy justifications for clear statutory language. *See* Kenneth Culp Davis & Richard

J. Pierce, Jr., *Administrative Law Treatise* §§ 3.2, 3.3 (3rd ed.1994) (discussing *Chevron*'s attempt to curtail judicial policy-making).

V

Although we conclude that Edelman failed to timely file a charge of discrimination, we recognize that this failure does not deprive the court of subject matter jurisdiction. *See Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982) ("We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling."). But *see Davis v. North Carolina Dep't of Correction*, 48 F.3d 134, 137 (4th Cir.1995) (discussing Title VII's exhaustion requirement in jurisdictional terms).

Before we affirm the dismissal of Edelman's Title VII claim, we consider whether the facts of this case warrant equitable tolling of the limitations period. Edelman was represented by counsel at all stages of the administrative process. In fact, his initial letter to the EEOC referenced his attorneys by name. Despite the fact that Edelman attempts to attribute significant delay to the EEOC's processing of his complaint, he waited more than five months after the alleged discrimination before even contacting the agency. Moreover, the EEOC mailed the draft charge to him before the expiration of the limitations period. Had he promptly signed and returned the proposed draft, which included a form of oath or affirmation, his charge would have been timely filed.

We hold that Edelman is not entitled to equitable tolling of the limitations period. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("[T]he principles of equitable tolling ... do not extend to what is at best a garden variety claim of excusable neglect.").

VII

We believe this case is best summed up in the words of the Supreme Court:

> Procedural requirements established by Congress for gaining access to the federal courts are not to be

> disregarded by courts out of a vague sympathy for particular litigants.... [I]n the long run, experience teaches that strict adherence to the procedural requirements specified *512 by the legislature is the best guarantee of evenhanded administration of the law.

Baldwin County Welcome Ctr., 466 U.S. at 152, 104 S.Ct. 1723.

The judgment of the district court dismissing Edelman's action is affirmed, but on remand the district court should take proper action to indicate that the dismissal is for failure to exhaust administrative remedies rather than for lack of subject matter jurisdiction.

AFFIRMED AND REMANDED.

LUTTIG, Circuit Judge, concurring:

I would decide this case on the narrow ground that Edelman's second filing is ineligible for relation back because (1) Edelman characterized his initial filing as a *request* for a charge rather than as a charge; (2) the EEOC did not even treat Edelman's original filing as a charge; (3) the EEOC never served a copy of the letter on Lynchburg College; and (4) the second sworn letter, which allegedly amended the first letter, even alleges different discriminatory conduct than that charged in the original letter.

I am sufficiently uncomfortable with the broader ground for decision set forth in the majority opinion, that verification may never relate back after 180 days from the date of the alleged discriminatory action, that I am unable to concur in the opinion for the court. As to this issue, we are not confronted with a single statute stating either by terms or in effect that "a verified charge must be filed within 180 days of a discriminatory action." Were we confronted with a single statute worded in this way, then the plain meaning interpretation advanced in the opinion for the court would, I think, be unassailable. Instead, we are presented with two statutes, the first providing that a charge shall be filed within 180 days of the unlawful employment practice, and the second providing that charges shall be in writing and include an oath or affirmation.

Although I confess some uncertainty as to this, it seems to me that, between these two statutes, there is not *necessarily* the nexus required in order to sustain the plain meaning interpretation advanced in the opinion. That is to say, it seems to me *at least plausible* to read the first statute to require simply that a charge be filed within 180 days, and the second as freestanding of the first, and simply to require that, before a charge is finalized, all of the allegations and information required by the EEOC be provided and verified. Of course, if the two statutes are so read as temporally independent of each other, or at least not temporally coterminous, then there is no statutory requirement that the charge be verified within the 180 days, and relation back would be available by regulation.

Apart from what I believe is its inherent structural logic, this interpretation is plausible because there is no statutory

definition of "charge," contrary to the implicit premise of the majority's opinion. There is no statutory definition that provides that, in order to constitute a "charge," an allegation must be verified. Thus, the "charge" that must be filed within 180 days need not--at least need not by definition--be an allegation that is verified or that includes all the information that eventually must be provided before it is sufficiently complete to require notice to the employer. Insofar as the statute informs us, the "charge" that must be filed within 180 days can be merely an allegation of discrimination; it need not be verified.

As precisely as I can state it--and I readily concede that the point is conceptually elusive--the majority's interpretation seems to me actually to depend entirely upon reading the two statutes as if they were one. And I fear that it is *only* through reading the two as one that the nexus necessary to the majority's interpretation is supplied; in other words, unless the two statutes are read as one, I believe that it is impossible to say, with the certainty necessary to abrogate the agency's contrary interpretation, that a charge must be filed *and* verified within 180 days of the alleged discriminatory action.

I do not believe that the alternative interpretation I suggest is the only interpretation of the two statutes, by any means. Indeed, I do not even believe that it is the better interpretation; in fact, I believe that the one adopted by the majority is the better. But I do believe that this alternative interpretation of the agency is a plausible one. And, of course, being such, we are bound to give deference to that administrative interpretation.

For these reasons, I concur only in the judgment of the court.

FACSIMILE TRANSMISSION COVER SHEET

DATE: Nov. 14, 1997

SENT TO: Rosalind Hall-Smith

AT: The Equal Employment Opportunity Commission

3600 West Broad Street Richmond, Virginia 23230

FAX NUMBER: (804) 278-4660

PAGES INCLUDED IN THIS TRANSMISSION: This sheet and 5 others.

FROM: Dr. Leonard Edelman

Lynchburg College

Lynchburg, Virginia 24501

MESSAGE:

Enclosed please find my request to file a charge of employment discrimination against Lynchburg College.

November 14th 1997

To: Rosalind Hall-Smith
The Equal Employment Opportunity Commission
Room 229
3600 West Broad Street
Richmond, Virginia 23230

Via: FAX: (804) 278-4660

From: Leonard Edelman
Assistant Professor
Biology Department
Lynchburg College
Lynchburg, VA 24501

Re: Filing a charge of employment discrimination against Lynchburg College, Lynchburg, VA 24501

Dear Madam,

Please accept this letter as my request to file a charge of employment discrimination against Lynchburg College in regards to their personnel decisions concerning me during January - June, 1997 culminating in the denial of my continued employment at the college. I call upon the EEOC to investigate the personnel decision-making process during the past four years at Lynchburg College which has subjected many people to illegal discrimination and created an unjust and unfair employment situation.

I came to Lynchburg College during August, 1993 as a tenure-track assistant professor in the Biology Department. My appointment included 2 years service credit for my previous teaching position. That meant that following a 4 year 'probationary and evaluation period' I would be eligible for

tenure and promotion to associate professor (i.e. during the Fall, 1996 semester).

During my 'probationary and evaluation period' I received the highest praise, commendations, evaluations and recommendations both verbally and in writing from my students, faculty colleagues, staff members and administrators (in particular the Dean of the College, Jacqueline Asbury). Each year I was reappointed with very gratifying written recommendations from the Dean of the College. I was awarded a merit pay increase for excellence in teaching. My classroom teaching and student commentary about my teaching appeared in a promotional video produced by the college to recruit new students. My teaching and research work at Lynchburg College has consistently received critical acclaim from all sources at the school. My students have received top academic awards from the school and gone on to medical and graduate schools upon graduation. The Dean paid for my travel to several prestigious educational conferences. I was asked to speak to a gathering of hundreds of parents of prospective students. Last fall I was chosen by the Dean to be the faculty representative to the Board of Trustees meeting. I have been instrumental in the establishment of undergraduate research at Lynchburg College. I was recently awarded the top research grant from the college for me and one of my students to continue our laboratory work during the summer months of 1997. *Never once* during this probationary and evaluation period did I receive a poor evaluation nor a less than exemplary recommendation at Lynchburg College. *Never once*, either verbally or in writing or in any manner, was I criticized nor directed to take corrective action about any portion of my work.

The last phase of my tenure and promotion process began during the Fall, 1996 semester with final reviews, interviews and recommendations first by the chair of the Biology Department, then by an *ad hoc* faculty committee, and then by

the Faculty Personnel Committee. I received the highest recommendations and unanimous approval from all these persons and committees.

Next in the process came the recommendation from the Dean of the College, Jacqueline Asbury. It arrived at my office on January 16th 1997. *For the first time* during my service at Lynchburg College I suddenly received a negative recommendation. She denied my tenure and promotion for her stated reasons of ineffective teaching and unproductive scholarly work. Needless to say this was a shocking, inexplicable, and totally unexpected surprise to me, all my colleagues at Lynchburg College and my family. I wrote to and met with Dean Asbury as did several of my colleagues in an attempt to make sense out of her very unexpected decision. The resulting conversations and subsequent written letters from her were at best ambiguous, at worst arrogant and unintelligible. They only served to make her sudden negative decision even more bewildering to all of us and her unsubstantiated allegations even more muddled. Nevertheless she persisted in her denial of my tenure and promotion.

I filed a grievance with the Faculty Grievance Committee based on multiple procedural violations by the Dean and the President of the College. The committee conducted an investigation which included comprehensive reviews of four years of written materials and extensive interviews with all the people involved in the process. Based upon their findings the committee voted unanimously and convincingly in my favor. Their assessment was that not only were there multiple procedural violations committed by the President and the Dean, but at some points my academic freedom had certainly been infringed upon. They forwarded their full report to the President of the College, Charles Warren, including several very reasonable recommendations for rectifying the situation. In his reply the President rejected all such recommendations,

but made a proposal of his own the implementation of which was contingent on my acceptance. Despite some reservations I accepted his proposal. He then wrote back rejecting my acceptance of his proposal!

Soon after that unusual sequence of events, the President and then the Board of Trustees of the College informed me of their decisions to support the Dean's decision and deny my tenure and promotion. The final letter from the President arrived at my home by certified mail on June 6th 1997 informing me of the date of my last day of employment at the college.

The suddenness and totally unexpected nature of this decision, the dramatic disparity and inconsistency with four years (i.e. my stated probationary period) of only very positive evaluations and exemplary recommendations, and the unsubstantiated and ambiguous allegations initially posed by the Dean are at best puzzling, and at worst onerous. I believe some answers can be found with a look back to the somewhat distant past and to the recent past at Lynchburg College.

Dean Asbury has been at Lynchburg College since 1960. For a long time she was a member of the faculty and the lone female member of her department. She has described the difficulties she endured under those circumstances, the deep-seated feelings resulting from her lack of power to address certain situations, and her agenda which grew out of those times. As Dean during the past four years she has been outspoken about her plans to bring many more women to Lynchburg College and reduce the number of male faculty. My review of her record of personnel decisions since becoming Dean four years ago has shown me that all non-renewal of contracts and adverse employment actions have occurred exclusively to white males at the college, while all positive tenure and promotion decisions have occurred to only women

and one hispanic male. She has hired many new administrators, all women to the best of my knowledge. She has unsuccessfully attempted to remove at least two tenured professors, both white males. At the same time my tenure and promotion were being denied it was being granted to two women both in the same department. It is my understanding that such a decision involving two members of the same department at the same time is highly unusual.

I believe my case is one of gender-based employment discrimination, exacerbated by discrimination on the basis of my family's national origin and religion. I believe this will be verified in a formal examination of the official records of personnel decisions by Dean Asbury and the current administration during the past four years, and in interviews with members of the college community who have known Dean Asbury over the years. In addition, although not readily apparent from the written documentation, it is also clear that my national origin and religious heritage have apparently played a role in the sudden and unsubstantiated judgements of the college administration. This would explain why (e.g.) the Dean has refused to disclose the evidence or reasons for her judgement which runs diametrically opposed to the overwhelmingly unanimous judgements of a great number of reasonable and well-educated people. She has only offered the assertions of unnamed sources in unnamed places at undetermined times under unknown circumstances. How unfortunate that a person like myself, who is a first generation American of Polish-Jewish descent, can perform at the level I have performed and achieve far beyond all the expectations that were demanded of me, to then be subjected to such bigotry and capriciousness. My family journeyed a long way to America to be free of such fears. Therefore, I hereby file a charge of employment discrimination against Lynchburg College (Dean Jacqueline Asbury, President Charles Warren and the Board of

Trustees) and I call upon the EEOC to investigate this case in an attempt to rectify this unjust and unfair situation before any more people are subjected to this illegal discrimination.

Thank you for your attention and consideration in this matter. You should be hearing from my attorneys Edward Hogshire and Kristine Smith whose addresses, phone and fax numbers are shown below.

Sincerely,

/s/ Leonard Edelman

Leonard Edelman
Assistant Professor
Biology Department
Lynchburg College
(804) 544-8367 (office)
(804) 544-8499 (fax)
edelman@hobbs1.lynchburg.edu
(804) 525-6627 (home)

cc:

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(804) 977-4847 (fax)

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Lynchburg, Virginia 24505
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(804) 846-0337 (fax)

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211 East High Street
Charlottesville, VA 22902
Telephone: (804) 977-7977
Facsimile: (804) 977-4847

November 26, 1997

Ms. Rosalind Hall-Smith
Intake Supervisor,
Richmond Area Office
Equal Opportunity Commission
3600 Broad Street
Richmond, VA 23230

RE: Leonard Edelman/Lynchburg College
(sent via facsimile no. 804-278-4660)

Dear Ms. Hall-Smith:

This to follow-up on our telephone conversation regarding the above-named matter. This firm, along with the firm of Edmunds & Williams in Lynchburg, represents Professor Edelman, who filed his complaint of discrimination against Lynchburg College on November 14, 1997. Professor Edelman would like to have a personal interview with an EEOC investigator prior to the final charging documents being served on the college. It is my understanding that delay occasioned by the interview will not compromise the filing date, which will remain as November 14, 1997. Please advise if my understanding in this regard is not correct.

Finally, please have the investigator contact this office to schedule the interview at a mutually convenient time.

Thanking you for your assistance, I am

Yours sincerely,

/s/ Edward L. Hogshire

Edward L. Hogshire

cc: Prof. Leonard Edelman
Kristine Smith, Esq.

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Richmond Area Office

[Seal]

3600 West Board Street
Room 229
Richmond, VA 23230
PH: (804) 278-4651
TDD: (804) 278-4654
FAX: (804) 278-4660

December 3, 1997

Leonard Edelman
Assistant Professor
Biology Department
Lynchburg College
Lynchburg, VA 24502

RE: Lynchburg College

Dear Mr. Edelman:

Your letter concerning allegations of employment discrimination has been received. The information you provided is not sufficient for us to continue investigating your case. Additional information is needed before we can pursue this matter. Our experience is that an interview is the best way to obtain the needed information. Please call this office immediately. If you are unable to come to the office, the interview can be conducted by telephone. Whether in person or by telephone, the interview can be expected to take at least an hour.

To arrange an interview, please call during our office hours, which are 8:30 AM to 5:00 PM, Monday through Friday. Our telephone number is (804) 278-4651. If you are outside the local calling area, you may call our office toll-free number 1-800-669-4000.

I urge you to contact us as soon as possible because a charge of discrimination must be filed within the time limits imposed by law, within 180 days of the alleged discrimination in the state of Virginia. When you call or visit, please mention that you are responding to this letter.

PLEASE ASK TO SPEAK WITH AN OFFICER OF THE DAY IN ORDER THAT YOUR INQUIRY CAN BE SCREENED AND AN APPOINTMENT CAN BE SCHEDULED IF NECESSARY.

IF WE HAVE NOT HEARD FROM YOU AT ALL WITHIN 30 DAYS OF THIS LETTER, WE WILL ASSUME THAT YOU DID NOT INTEND TO FILE A CHARGE OF DISCRIMINATION WITH US.

Sincerely,

/s/ Rosalind Hall-Smith
Rosalind Hall-Smith
CR/TIU Supervisor

RHS/hs

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Richmond Area Office

[Seal]

3600 West Board Street
Room 229
Richmond, VA 23230
PH: (804) 278-4651
TDD: (804) 278-4654
FAX: (804) 278-4660

DATE OF NOTICE: February 17, 1998

NAME: Leonard Edelman
Assistant Professor, Biology Department,
Lynchburg College
Lynchburg, VA 24502

EEOC APPOINTMENT NOTICE

Office

Your interview is scheduled as follows:

DAY: Tuesday DATE: March 3, 1998 TIME: 2:00 pm

The interview will probably take two hours. If you are scheduled for an interview in our office, please bring all documents, letters and/or notes as well as names, addresses and telephone numbers of witnesses which you believe may support your allegations. If you are scheduled for a telephone interview, please have these relevant documents/information available for reference.

Please be advised you will be given a 15 minutes grace period after the time of your scheduled appointment. If you are not present or cannot be reached at the telephone number given to us, you will lose your appointment. If you cannot keep your appointment or know that you will be late, please call the undersigned at (804) 278-4651 or 1-800-669-4000. Advise us as soon as possible if you are unable to keep your appointment.

Reminder: You have 180 days from the date of the alleged violation to file a charge with our office, unless you work for the Commonwealth of Virginia, in which case you have 180 days.

Sincerely,

/s/ Rosalind Hall-Smith
Rosalind Hall-Smith
CRTIU Supervisor

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
3600 West Board Street, Rm 229
Richmond, VA 23230
(804) 278-4652
Fax: (804) 278-4660

March 18, 1998

Dr. Leonard Edelman
100 Prestview Drive
Forest, VA 24551

Re: Edelman v. Lynchburg College

Dear Dr. Edelman:

This is to acknowledge your charge of employment discrimination against the above named Respondent.

The attached EEOC Form 5, Charge of Discrimination, was drafted as a result of information provided. To facilitate proper handling of this action by the Commission, you should:

1. Review the enclosed charge forms.
2. Sign the charge in the bottom left hand block. If this charge is more than one page long, all pages
3. Return the signed charges to this office in the enclosed postage paid envelope.
4. Should there be corrections or additions that you wish to make on the charge, make the correction above the error and then initial the change.

Also enclosed is an EEOC Form 133a, "Affidavit", which has been prepared from the information which you supplied. Please

initial each page and any corrections. Your signature is required on the final page. Your signature makes the document your sworn statement. This must be returned with your charge.

Should you not return this charge to this office, your charge will not be processed. Please call me if you have any questions.

Sincerely,

Regina C. McPhie
Investigator

dtm

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form

AGENCY	CHARGE NUMBER
☐ FEPA	122980526
☒ EEOC	

_____ and EEOC
State or local Agency, if any

NAME *(Indicate Mr. Ms. Mrs.)* Dr. Leonard Edelman
HOME TELEPHONE *(Include Area Code)* (804) 525-6627

STREET ADDRESS	CITY, STATE AND ZIP CODE
100 Crestview Drive	Forest, VA 24551
DATE OF BIRTH	8/25/49

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME
(If more than one list below)

NAME Lynchburg College
NUMBER OF EMPLOYEES, MEMBERS Cat B (101-200)
TELEPHONE *(Include Area Code)* (804) 544-8100
STREET ADDRESS Lynchburg, VA 24501
COUNTY 680

* * * *

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION
☐ NATIONAL ORIGIN ☐ RETALIATION ☐ AGE
☐ DISABILITY ☐ OTHER *(Specify)*

DATE DISCRIMINATION TOOK PLACE

Earliest	*Latest*
06/06/97	06/06/97

☐ CONTINUING ACTION

THE PARTICULARS ARE *If additional space is needed, attach extra sheet(s)):*

1. I was hired as an Assistant Professor on a tenure track in August 1993. I was notified on June 6, 1997, that my petition for tenure is denied and my employment will be terminated effective May 1998.

2. Charles Warren, President, informed me that the Board of Trustees' decision was to deny my petition for tenure and promotion. His letter also stated that my employment with the College will be terminated effective May 1998.

3. I believe that I was denied tenure and terminated because of my sex (male) in violation of Title VII of the Civil Rights Act of 1964 as amended.

* * * *

I declare under penalty of perjury that the foregoing is true and correct.

4/7/98	/s/ Leonard Edelman
Date	Charging Party *(Signature)*

* * * *

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Dr. Charles Warren
President
Lynchburg College
1501 Lakeside Drive
Lynchburg, VA 24501

PERSON FILING CHARGE
Edelman, Leonard

THIS PERSON (check one)
☒ CLAIMS TO BE AGGRIEVED
☐ IS FILING ON BEHALF OF ANOTHER

DATE OF ALLEGED VIOLATION

Earliest	*Most Recent*
	06/06/97

PLACE OF ALLEGED VIOLATION
Lynchburg, VA

CHARGE NUMBER
122980526

NOTICE OF CHARGE OF DISCRIMINATION
(See EEOC "Rules and Regulations" before completing this Form)

You are hereby notified that a charge of employment discrimination has been filed against your organization under:

- ☒ TITLE VII OF THE CIVIL RIGHTS ACT OF 1964
- ☐ THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967
- ☐ THE AMERICANS WITH DISABILITIES ACT
- ☐ THE EQUAL PAY ACT (29 U.S.C., SECT 206(d)) investigation will be conducted concurrently with our investigation of this charge.

The boxes checked below apply to your organization:

1. ☐ No action is required on your part at this time.
2. ☒ Please submit by 05/05/98 a statement of your position with respect to the allegation(s) contained in this charge, with copies of any supporting documentation. This material will be made a part of the file and will be considered at the time that we investigate this charge. Your prompt response to this request will make it easier to conduct and conclude our investigation of this charge.
3. ☐ Please respond fully by _____ to the attached request for information which pertains to the allegations contained in this charge. Such information will be made a part of the file and will be considered by the Commission during the course of its investigation of the charge.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

Richmond Area Office
3600 W. Broad Street
Room 229
Richmond, VA 23230

Irma Dillard, Supervisor
(Commission Representative)

(804) 278-4671
(Telephone Number)

☒ Enclosure: Copy of Charge

BASIS OF DISCRIMINATION
☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION
☐ NAT. ORIGIN ☐ AGE ☐ DISABILITY
☐ RETALIATION ☐ OTHER

CIRCUMSTANCES OF ALLEGED VIOLATION
See enclosed Form 5, Charge of Discrimination.

DATE:
04/21/98

TYPED NAME/TITLE OF AUTHORIZED EEOC OFFICIAL
Gloria L. Underwood

SIGNATURE
/s/ Gloria L. Underwood

RESPONDENT'S COPY

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Virginia Council On Human Rights
1100 Bank Street
Richmond, Virginia 23219

DATE 04/21/98
EEOC CHARGE 122980526
FEPA CHARGE

SUBJECT: CHARGE TRANSMITTAL
Edelman, Leonard *(Charging Party)* v. Lynchburg College *(Respondent)*

Transmitted herewith is a charge of employment discrimination initially received by the:
☒ EEOC ☐ _____ *(Name of FEPA)* on 04/15/98 *(Date of Receipt)*

☒ Pursuant to the worksharing agreement, this charge is to be initially investigated by the EEOC.

☐ Pursuant to the worksharing agreement, this charge is to be initially investigated by the FEPA.

☐ The worksharing agreement does not determine which agency is to initially investigate the charge.
- ☐ EEOC requests a waiver
- ☐ No waiver requested
- ☐ FEPA waives
- ☐ FEPA will investigate the charge initially

Please complete the bottom portion of this from to acknowledge receipt of the charge and, where appropriate, to indicate whether the Agency will initially investigate the charge.

TYPED NAME OF EEOC OR FEPA DIRECTOR
Gloria L. Underwood

SIGNATURE /s/ Gloria L. Underwood

Edelman, Leonard v. Lynchburg College
(Charging Party) *(Respondent)*

To whom it may concern:

- ☐ This will acknowledge receipt of the referenced charge and indicate this Agency's intention to initially investigate the charge
- ☐ This will acknowledge receipt of the referenced charge and indicate this Agency's intention not to initially investigate the charge
- ☐ This will acknowledge receipt of the referenced charge and request a waiver of initial investigation by the receiving agency.
- ☐ This will acknowledge receipt of the referenced charge and indicate this agency's intention to dismiss/close/not docket the charge for the following reason:

TYPED NAME OF EEOC OR FEPA DIRECTOR
Roxie Raines Kornegay

SIGNATURE

TO: Richmond Area Office
3600 W. Broad Street
Room 229
Richmond, VA 23230

DATE
EEOC CHARGE 122980526
FEPA CHARGE

LAW OFFICE OF
ALEXANDER W. BELL
715 COURT STREET
P.O. BOX 739
LYNCHBURG, VIRGINIA
24505-0739

ALEXANDER W. BELL
MARY V. BARNEY

LISA S. WHITE
Paralegal

TELEPHONE
(804) 528-0411

FACSIMILE
(804) 845-3666
E-MAIL: awb@abellaw.com

May 29, 1998

Irma Dillard, Supervisor
EEOC
Richmond Area Office
3600 W. Broad Street, Room 229
Richmond, VA 23230

RE: EEOC Charge No. 122980526

Dear Ms. Dillard:

This letter constitutes the position statement of Lynchburg College in this matter. Dr. Leonard Edelman, formerly an assistant professor of biology at Lynchburg College, has claimed that he was denied tenure and promotion to associate professor based on his gender. Edelman's claim of discrimination is not only untimely filed with the EEOC, it is entirely without basis.

The Untimeliness of Edelman's Charge

The College notes first that Dr. Edelman's EEOC charge was not timely filed. Dr. Edelman filed his charge on April 15, 1998, 327 days after May 23, 1997, when he was informed that his requests for tenure and promotion had been denied by the

College's Board of Trustees (Exhibit 1).[1] Edelman received the notice through campus mail on May 23, 1997, the same day the Trustees met. The notice was also sent by certified mail, and was apparently received by Edelman on June 6, 1997, the date he identifies in his EEOC charge. Regardless of which date is used, Edelman's charge was filed too late and must be dismissed as untimely.

Lynchburg College

Lynchburg College ("the College") is a liberal arts college located in Lynchburg, Virginia. It has approximately 1,280 undergraduate students. During the 1997-1998 academic year, the College had 106 full-time faculty, of whom 74 were tenured, 13 were on the tenure track, and 19 were not on the tenure track. Fifty-four of the 74 tenured faculty were male, as were 5 of the 13 on the tenure track and 9 of the 19 faculty not on the tenure track. The Biology Department, of which Dr. Edelman was a member, had 5 faculty during the 1997-1998 academic year, all of whom were male, and 3 of whom were tenured.

Edelman's Work History and the Tenure Process at Lynchburg College

Dr. Edelman was hired as an assistant professor of biology in May of 1993. He had previously taught at Stockton State College for three years. While faculty at Lynchburg College ordinarily teach for six years before being considered for

---

[1] In states that have established a qualifying "deferral agency", complainants have 300 rather than 180 days to file their charges with the EEOC, *see* 42 U.S.C. § 2000e-5(e)(1), but Edelman missed even the 300-day deadline. This is true whether May 23 or June 6, 1997 is used as the operative notification date. It should be noted that the Federal District Court for the Western District of Virginia has ruled that Virginia is not a deferral state, *see, e.g., Tokuta v. James Madison University*, 977 F.Supp. 763 (W.D. Va. 1997) (on appeal to the Fourth Circuit).

tenure, Edelman at his own request was placed on a faster four-year track. In 1996, he received a "mid-level' merit salary increase. In 1997, he did not receive a merit salary increase.

Dr. Edelman came up for tenure during the 1996-1997 academic year. The College's Faculty Handbook sets out the procedures for consideration of tenure, as follows. Candidacy for tenure is reviewed by the candidate's department chairperson, and also by an ad hoc committee composed of three faculty members selected by the candidate. Both the ad hoc committee and the chairperson forward a recommendation to the Faculty Personnel Committee. That Committee makes a recommendation to the Dean of the College, who in turn makes a recommendation to the President of the College. The President reviews all four recommendations, along with materials submitted by the candidate and other participants in the review process. The President then makes a recommendation to the Board of Trustees, which makes the final decision.

In Dr. Edelman's case, the department chairperson, the ad hoc committee, and the Personnel Committee recommended in favor of tenure (Exhibits 2, 3, and 4). Dr. Jacqueline Asbury, Dean of the College, recommended that tenure be denied (Exhibit 5). Charles Warren, President of the College, also recommended against tenure (Exhibit 6). The Board of Trustees denied tenure to Dr. Edelman on May 23, 1997 (Exhibit 1). As is required in such cases, Edelman was offered a contract to teach at the College for one more year, and he accepted this offer for the 1997-1998 academic year. His employment with the College has now ended.

In the midst of the review process, before Dean Asbury's recommendation was finalized, Dr. Edelman filed a grievance concerning the Dean's recommendation. The Faculty Handbook does not authorize a grievance at this stage of the

process. Nonetheless, a faculty grievance committee met to consider Edelman's complaint and issued a report and recommendations (Exhibit 7). It is apparent from the report that the committee's primary concern was that the Dean's recommendation was not in line with those of the faculty committees involved. While the grievance committee of course had no authority to change the Dean's recommendation, the committee "encouraged" Dr. Warren and the Dean to meet with the relevant faculty to discuss the procedures and standards used to evaluate Edelman.

In his response to the grievance committee, Dr. Warren correctly took the position that a new round of meetings and re-evaluation of Dr. Edelman would be inconsistent with the procedures prescribed by the Faculty Handbook and also the Board of Trustees. However, Dr. Warren offered, subject to Edelman's agreement, to consider any additional statements from the faculty and the Dean (Exhibit 8).

Dr. Edelman responded by expressing concern that Dr. Warren's proposal could produce worrisome "unexpected consequences". He also stated that the "wealth of information" already provided to Dr. Warren provided ample grounds for a tenure decision. Having stated his "reservations" concerning Dr. Warren's proposal, Edelman stated that he consented to it (Exhibit 9). Given the pervasive nature of Edelman's expressed concerns, Dr. Warren decided to defer to those concerns (Exhibit 10). Accordingly, Dr. Warren proceeded with his evaluation of Edelman's candidacy based on the "wealth of information and documentation" referred to by Edelman in support of his candidacy (Exhibit 9). Dr. Warren, acting strictly in accord with the procedures set forth in the Faculty Handbook, recommended that tenure be denied.

Edelman's Lack of Qualification for Tenure

Tenure decisions are based on teaching, scholarship, and service to the College. Tenure is not granted to teachers as a matter of right. It has historically been awarded by the governing boards of institutions only to those candidates who have met a rather substantial burden of demonstrating their past and likely future effectiveness as teachers, scholars, and college citizens. Because fellow faculty -- especially in small departments -- have a strong tradition of wholesale recommendation of their colleagues for tenure, these decisions are not left to the faculty's discretion, but are placed in the hands of the administration and ultimately the Board of Trustees. This is the case not only at Lynchburg College, but also at virtually all colleges nationwide.

In Dr. Edelman's case, the faculty who reviewed his qualifications recommended tenure. Reasonable academics acting in good faith can and often do disagree, however, on what constitutes evidence of effective teaching, scholarship, and service sufficient to meet the burden required for a grant of tenure. It should be noted that the faculty letters recommending tenure are not whole-hearted endorsements, and are devoid of meaningful discussion of scholarly, as opposed to service, activities. Careful review of the record by Dr. Warren, himself a biologist, revealed that Edelman had not made the required affirmative case for tenure.

Given the record, Dr. Warren's decision is hardly surprising. Dr. Edelman's teaching reviews, while not entirely negative, were decidedly mixed. Moreover, evidence of Dr. Edelman's scholarship after 1991 is practically non-existent. The College's printed reviews of faculty scholarship for academic years 1993 through 1997 reveal no entries whatsoever for Dr. Edelman. While Dr. Edelman mentioned publications

supposedly under preparation, these have not seen the light of day.

Since hiring counsel, Edelman has made a number of claims concerning his record at Lynchburg College that are intended to support his argument that he deserved tenure. Some of these claims -- for example, that his "student evaluations were overwhelmingly positive," that his scholarly productivity was high "compared to the productivity of other tenure-track faculty," and that he was "the only faculty member at that time engaged in funded scientific research" -- are simply false. Other claims -- for example, that Edelman was sent to faculty development seminars "premised upon his excellence in teaching, scholarship and research", have a kernel of truth but are highly exaggerated. In this example, the seminars referred to are ordinary faculty development seminars for which the level of excellence described by Edelman was not required, and which Edelman certainly did not achieve. The College would be pleased to provide to the EEOC information concerning any claims concerning his performance at the College that Edelman may raise in his submissions to the agency.

Edelman's Claim of Gender Discrimination

In his charge to the EEOC, Dr. Edelman states that he was "denied tenure and terminated because of my sex (male) in violation of Title VII of the Civil Rights Act of 1964, as amended." The charge contains no facts in support of this allegation, and the record reveals no evidence of discrimination. As noted above, the College has far more male tenured faculty than female, and has both males and females on the tenure track and in non-tenure track positions. Also, due to a large increase in enrollment, the College has hired 14 full-time faculty for the coming year, with one offer still outstanding. Six of these new faculty are female and eight are male; the outstanding offer is to a male. Three of the new

faculty, two females and one male, will be assistant professors of biology. The male and one of the females are on the tenure track.

While Edelman's charge does not discuss the basis of his claim, a letter received by the College from Edelman's counsel indicates that his accusation of gender discrimination focuses solely on Dean Asbury, whom he accuses of "a clear pattern of adverse treatment of white males." Edelman's counsel's letter to the College goes on to make the following allegation:

> Our investigation has revealed that since the beginning of [Dean of the College] Asbury's tour as dean four years ago, all non-renewals of contracts and denials of tenure and promotion decisions have occurred exclusively to white males at the College, while all positive tenure and promotion decisions have occurred only for the benefit of women, with the exception of one hispanic male.[2]

This allegation is false. Both males and females have been granted tenure and promotions since the 1993-1994 academic year, Dean Asbury's first full academic year in the position. More females than males have come up for tenure during this time period, but this is the result of the ordinary tenure cycle of faculty who were hired before Asbury became dean. Also, contrary to Edelman's assertion, both male and female faculty have had negative adjustments of their employment status, including nonrenewal of employment contracts, during this time period.

---

[2] Through the use of the term "white male" and other racial references, Edelman has hinted that he was discriminated against on the basis of race as well as gender. His EEOC charge does not raise a race discrimination claim, however, and therefore the College does not respond to such a claim, other than to state that any such claim would be groundless.

Edelman also claims, inexplicably, that Dean Asbury has made "two abortive attempts to remove at least two tenured professors during this time period, both of them white males." This is not true, and in fact is so far from true that the College simply does not know what Edelman is alluding to.

Finally, Edelman has complained that during the same year his tenure was considered, the College granted tenure to two female professors in another department, Communications Studies. Apparently Edelman finds it difficult to believe that two qualified female scholars came up for tenure at the same time. But this is precisely what happened, and these women's success in achieving tenure provides no evidence that discrimination was at work in Edelman's failure to do so.

The College is well aware that Dr. Edelman regards Dean Asbury's recommendation to Dr. Warren as flawed and discriminatory. However, even if this were true -- which it is not -- Dr. Warren conducted an independent review of the record in reaching his recommendation concerning Dr. Edelman. This is precisely what Edelman himself urged the President to do. As far as the College is aware, Edelman has yet to accuse Dr. Warren of anti-male bias.

The College recognizes that denial of tenure is a difficult and painful experience. Unfortunately, Dr. Edelman has chosen to channel his disappointment over a professional failure into a baseless and irresponsible claim of discrimination.

Conclusion

The College asks that the Commission dismiss Edelman's claim as untimely. In the alternative, the College asks that the Commission conclude its investigation and issue a no cause determination. Please do not hesitate to contact counsel for the College with any questions.

Sincerely,

/s/ Mary V. Barney

Mary V. Barney

MVB/djh
enclosures

bcc: Charles Warren
Lynchburg College

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Richmond Area Office

[Seal]

3600 West Broad Street
Room 229
Richmond, VA 23230
(804) 278-4651
TTY (804) 278-4654
FAX (804) 278-4660

DECLARATION

I, Gloria L. Underwood, Director of the Equal Employment Opportunity Commission (EEOC) Richmond Area Office, am the official custodian of the records maintained in the Richmond Area Office.

I have reviewed the EEOC file, Leonard Edelman vs Lynchburg College, Charge Number 122-98-0526. Based on that review I state the following:

1. On November 18, 1997, Leonard Edelman's letter dated November 14, 1997 alleging employment discrimination was received in the EEOC Richmond Area Office. (Attachment 1) The letter identified the complaining party, the respondent, the date of harm, and detailed allegations of discrimination based on gender, national origin, and religion, all allegations of discrimination covered by the statutes enforced by the EEOC.

2. On November 28, 1997, the EEOC Richmond Area Office received a letter dated November 26, 1997 and addressed to Rosalind Hall-Smith, Supervisor of the Charge Receipt/Technical Information Unit of the Richmond Area Office, from Mr. Edward L. Hogshire, attorney for Mr. Edelman. (Attachment 2) Mr. Hogshire communicated his

understanding that Mr. Edelman's letter dated November 14, 1997 served as a complaint of discrimination for purposes of determining the filing date. Mr. Hogshire requested that Ms. Hall-Smith advise him if the EEOC was of the opinion that any delay in scheduling a personal interview between Mr. Edelman and an EEOC Investigator and serving finalized charging documents on the respondent would compromise his understood filing date of November 14, 1997.

3. My review of the file indicates that the EEOC considered Mr. Edelman's November 14, 1997 letter as a minimally sufficient charge and that the Richmond Area Office began its intake process by drafting correspondence requesting more information and seeking to schedule an interview. The file does not indicate that Ms. Hall-Smith responded to Mr. Hogshire's November 26th letter by advising him of any contrary position.

4. On December 4, 1997, Rosalind Hall-Smith sent Mr. Edelman a letter dated December 3, 1997 advising Mr. Edelman of the agency's need for additional information to further investigate his case. The letter requested that Mr. Edelman contact our office to arrange for an interview (Attachment 3)

5. Mr. Edelman responded to the December 4th letter by contacting this office and, on February 17, 1998, Ms. Hall-Smith sent an appointment notice of that same date advising Mr. Edelman that he was scheduled for an interview on Tuesday, March 3, 1998 at 2:00 p.m. (Attachment 4).

6. On March 3, 1998, Regina McPhie, Investigator, conducted a telephone interview with Mr. Edelman resulting in the perfected charge of sex discrimination, i.e., the verified charge on EEOC Form 5, being drafted for Mr. Edelman's signature.

7. On March 18, 1998, the drafted charge was mailed to Mr. Edelman for his signature.

8. On April 15, 1998 Mr. Edelman's signed perfected charge was received in the Richmond Area Office. My review of the file indicates that the EEOC considered the perfected charge to relate back to the November 14, 1997 letter originally setting forth Mr. Edelman's allegations.

I declare under penalty of perjury that the foregoing is true and correct.

August 9, 1999
Date

/s/ Gloria L. Underwood
Gloria L. Underwood
Area Director
Equal Employment Opportunity Commission
3600 West Broad Street; Room 229
Richmond, VA 23230

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Richmond Area Office

[Seal]

3600 West Broad Street
Room 229
Richmond, VA 23230
(804) 278-4651
TTY (804) 278-4654
FAX (804) 278-4660

DECLARATION

I, Rosalind Hall-Smith, am the supervisor of the Charge Receipt/Technical Information Unit (CR/TIU) in the Equal Employment Opportunity Commission (EEOC) Richmond Area Office.

I have reviewed the letter dated November 26, 1997 from Edward L. Hogshire, attorney for Leonard Edelman, which is a part of the EEOC file, Leonard Edelman vs Lynchburg College, Charge Number 122-98-0526. I do not specifically recall the telephone conversation that I had with Mr. Hogshire. However, when I discuss the issue of timeliness, I generally advise individuals to the effect that if the correspondence they submit to the EEOC identifies the complaining party, the Respondent, the date of harm, and an allegation of employment discrimination covered by the statutes enforced by EEOC, then EEOC would consider the correspondence to satisfy the statutes as to what a charge should contain.

Having reviewed Mr. Edelman's file and based on my general practice, I would have considered Mr. Edelman's letter dated November 14, 1997 as a minimally sufficient charge. Therefore, I would have considered the signed perfected charged of discrimination on EEOC Form 5, received in the

EEOC Richmond Area Office on April 15, 1998, to relate back to the November 14, 1997 filing date.

I declare under penalty of perjury that the foregoing is true and correct.

8/9/99
Date

/s/ Rosalind Hall-Smith
Rosalind Hall-Smith
Supervisor, CR/TIU
Equal Employment Opportunity Commission
3600 West Broad Street, Room 229
Richmond, VA 23230

IN THE UNITED STATES DISTRICT COURT,
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

DR. LEONARD EDELMAN

Plaintiff,

v. Civil Action No. 6:99CV0060

LYNCHBURG COLLEGE

Defendant.

DECLARATION

COMES NOW the Plaintiff, DR. LEONARD EDELMAN, and says the following:

1. On November 14, 1997, by facsimile and first class mail, I forwarded a letter containing allegations of discrimination on the basis of my sex, national origin and religion, a copy of which is attached hereto as Exhibit 1. In my letter, I requested the EEOC to accept my letter as my charge of employment discrimination against Lynchburg College.

2. On November 26, 1997, my attorney, Edward L. Hogshire, forwarded a letter to the EEOC confirming his telephone conversation with Rosalind Hall-Smith of the EEOC, a copy of which is attached hereto as Exhibit 2. In that letter, Mr. Hogshire reiterates Ms. Hall-Smith's assurance that, even though an interview was to be conducted, the EEOC would still consider the charge to be filed as of November 14, 1997.

3. On or about December 3, 1997 I received a letter from the EEOC setting forth instructions for scheduling the interview, a copy of which is attached hereto as Exhibit 3. The letter also stated that more information was needed in order for the EEOC to "continue investigating" my case.

4. Soon after receipt of the EEOC's December 3, 1997 letter, I contacted the EEOC to schedule the interview. Due to the EEOC's delays in returning my call and working to schedule the interview, the interview was not conducted until March 3, 1998. Some time after February 17, 1998, I received an EEOC Appointment Notice, a copy of which is attached hereto as Exhibit 4.

5. Sometime after that interview, the EEOC forwarded me a form entitled "Charge of Discrimination" for my signature. I signed the document on April 7, 1998 and forwarded it to the EEOC.

I declare under penalty of perjury that the foregoing is true and correct.

8/5/99 /s/ Dr. Leonard Edelman
Date Dr. Leonard Edelman

CASE LOG
(Continued on Reverse)

CHARGE NO.	RESPONDENT	CHARGING PARTY
122980526	Lynchburg College	Leonard Edelman

DATE	ACTION	ENTERED BY
11/14/97	Received faxed correspondence in office	RHS
11/19/97	Submitted for AG	RHS
12/4/97	Mailed [illegible]	JES
2/5/98	PCP is listed on the appt schedule for 3/3/98 2:00 pm walk-in	[illegible]
2/17/98	~~Charge # assigned and recorded~~ Appt letter mailed	[illegible]
3-3-98	called & did telp. Intv. Drafted Affidavit on P.C. counselled	REM
3-12-98	Drafted charge. called PCP talked him for Social Secruity #; Left message on tape.	REM
3-12-98	PCP called & Left his SS # on my voice mail. Added to file & completed assigment sheet. Turned in.	REM

DATE	ACTION	ENTERED BY
3/18/98	Mailed charge	dtm
4/10/98	Charge # assigned and recorded in charge register	[illegible]
5-29-98	~~Call~~ R's position & doc. faxed to ofc.	REM
6-1-98	Rec'd R's position pkg. Read position	REM
6-1-98	called R's Atty. to disc. CP's timelines	REM
7-17-98	Faxed 1st page CP's LX	[illegible]
7-20-98	Talked to [illegible]	[illegible]
7-21-98	[illegible]	[illegible]
7/21/98	RFI & letter to CP	dtm
7-28-98	In person intv. w/CP in ofc. Took affidavit.	REM
8-7-98	Rec'd. CP's follow-up letter.	
1-14-99	met w/TMC/Legal on case.	REM

DATE	ACTION	ENTERED BY
1-15-99	called CP's Atty. Left message.	REM
1-22-99	called CP' Atty. " "	REM
3-2-99	called CP's Atty. Left message	REM
3/02/99	conducted PDL w/ Atty. & [illegible]	REM
3/12/99	Rec'd. Reqt. 4 RTS	REM
3/15/99	Organized file.	REM
3/16/99	completed file/tabbed. Did memo & turned in. Request for RTS.	REM ↓
3/19/99	Type corresp. for sig.	ms
3/22/99	Received [illegible]	[illegible]
3/24/99	Signed RB	fa
3/29/99	Mailed corresp/Transf CR [illegible]	ms

Intake Notes

TITLE: Dr. SS# 079-40-1153

DOB: 8-25-49

RACE: White

SEX: male

religious and national origin discrimination discounted. Do not include as a basis.

contact person(s): (CP) Edward L. Hogshire, Esq.
Buck, Hogshire & Tereskerz, Ltd.
211 East High Street
Charlottesville, VA. 22902
(804) 977-7977

Respondent: Charles Warren, President
Lynchburg College
1501 Lakeside Drive
Lynchburg, VA. 24501
(804) 544-8200

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

DR. LEONARD EDELMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CL99021183-01
	)	
LYNCHBURG COLLEGE,	)	
	)	
Defendant.	)	
	)	

ORDER

On December 14, 1999, the parties, by counsel, appeared before the Court and argued the defendant's Demurrer to the plaintiff's Second Amended Motion for Judgment. Upon consideration of the pleadings and the argument of counsel, it is ORDERED that the defendant's Demurrer is sustained and this case is dismissed without leave to amend for the reasons stated in the letter opinion dated February 17, 2000.

The Clerk shall send copies of this order to all counsel of record.

ENTERED: 3-1-00

/s/ Mosby G. Perrow
HONORABLE MOSBY G. PERROW, III

We ask for this:

/s/ Alexander W. Bell
Alexander W. Bell
Mary V. Barney
ALEXANDER
BELL, PLC
715 Court Street
Counsel for defendant

C.C. A.W.B.
C.C. K.H.S.
C.C. E.C.B.

Seen and objected to:

/s/ Kristine H. Smith
Kristine H. Smith, Esquire
EDMUNDS & WILLIAMS
800 Main Street, Suite 400
Lynchburg, Virginia, 24505

Elaine Charlson Bredehoft, Esquire
Charlson Bredehoft, P.C.
11260 Roger Bacon Drive
Suite 201
Reston, VA 10190
Counsel for plaintiff

TWENTY-FOURTH
JUDICIAL CIRCUIT
OF VIRGINIA

RICHARD S. MILLER
JUDGE
LYNCHBURG CIRCUIT COURT
900 COURT STREET
P.O. BOX 4
LYNCHBURG, VIRGINIA 24505
(804) 847-1490

[SEAL]

MOBSY G. PERROW, III
JUDGE
LYNCHBURG CIRCUIT COURT
900 COURT STREET
P.O. BOX 4
LYNCHBURG, VIRGINIA 24505
(804) 847-1490

COMMONWEALTH OF VIRGINIA
CITIES OF LYNCHBURG AND BEDFORD
COUNTIES OF AMHERST, BEDFORD, CAMPBELL AND NELSON

February 17, 2000

Alexander W. Bell, Esq.
P.O. Box 739
Lynchburg, VA 24505

Elaine Charleson Bredhoft, Esq.
Charlson Bredehoft, P.C.
11260 Roger Bacon Drive
Suite 201
Reston, VA 20190

Re: *Leonard Edelman v.*
Lynchburg College

Dear Counsel:

The parties are before the Court on the defendant's demurrer to the plaintiff's second amended motion for judgment. The arguments made and authorities cited by counsel have been carefully considered. The demurrer will be sustained without leave to amend.

The case was commenced on January 13, 1999, with the filing of a three count motion for judgment alleging wrongful termination of employment, breach of contact and intentional infliction of emotional distress. Service of process was not sought at that time. On June 10, 1999, the plaintiff, with leave of Court, filed a six count amended motion for judgment alleging discrimination in the course of employment in violation of Title VII, wrongful termination of employment in violation of Title VII, negligent retention, breach of contract, intentional infliction of emotional distress, and defamation. The case was then removed to federal court where the two Title VII counts were dismissed with prejudice and the federal court remanded the case to this Court for prosecution of the remaining common law counts of negligent retention, breach of contract, intentional infliction of emotional distress and defamation. On October 19, 1999, this Court sustained a defense demurrer to those four counts with leave to amend the contract and defamation counts. On November 9, 1999, the plaintiff filed a second amended motion for judgment alleging breach of contract. The defamation count was not repled.

The issue is whether the second amended motion for judgment states a cause of action for breach of contract. Upon careful review of that pleading and the exhibits incorporated therein by reference, I am compelled to conclude that the second amended motion for judgment does not state a cause of action for breach of contract.

"[A] court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings," *Wards Equip. Inc. v. New Holland North America, Inc.*, 254 Va. 379, 382 (1997). The letter contract and that portion of the faculty handbook incorporated in that contract by reference contradict the plaintiff's factual allegations of "wrongful denial of tenure and termination in breach of his

contract of employment with the College" (paragraph 2 of Second Amended Motion for Judgment).

Mr. Bell is requested to prepare an appropriate order for endorsement by counsel and presentation to the court for entry.

Very truly yours,

/s/ Mosby G. Perrow
Mosby G. Perrow, III, Judge

MGP, III/vkh
cc: Kristine Smith, Esq.
Larry Palmer, Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 20th day of September, 2000.

Dr. Leonard Edelman, Appellant,

against Record No. 001288
Circuit Court No. CL 99021183-01

Lynchburg College, Appellee.

From the Circuit Court of the City of Lynchburg

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/ Wendy L. Tuck